92-1553

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAMES G. MESSER,
Petitioner,

v.

CITY OF DOUGLASVILLE, GEORGIA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the prohibition on all signs in the central business district in Douglasville, Georgia, except for those directing attention to products, services, activities or entertainment conducted, sold or offered on the premises on which the sign is located, constitutes an unconstitutional preference for commercial over noncommercial signs and an unconstitutional prohibition of the conveyance of ideas in violation of the First and Fourteenth Amendments.

2. Whether the exemption of certain types of signs from the permitting requirements and fees imposed by the Douglasville, Georgia, sign ordinance is an infringement of the First and Fourteenth Amendments.

3. Whether the provisions of the Douglasville, Georgia, sign ordinance requiring those posting a political or specific event sign to post a $500 bond, while imposing no similar burden on others, is an infringement of the First and Fourteenth Amendments.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

1. *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992). (App., *infra*, p. 1a.)

2. Order, United States District Court for the Northern District of Georgia, Case No. 1:90-CV-1521-RCF, entered June 26, 1991. (App., *infra*, p. 20a.)

3. Order, United States District Court for the Northern District of Georgia, Case No. 1:90-CV-1521-RCF, entered September 25, 1991. (App., *infra*, p. 26a.)

STATEMENT OF JURISDICTION

1. The date of the entry of the judgment or decree sought to be reviewed is October 22, 1992. On that date the United States Court of Appeals for the Eleventh Circuit affirmed the order of the United States District Court

for the Northern District of Georgia entering summary judgment in favor of the respondent.

2. On December 28, 1992, the United States Court of Appeals for the Eleventh Circuit entered an order denying petitioner's petition for rehearing and suggestion of rehearing en banc.

3. The statutory provision which confers jurisdiction on this court to review the judgment or decree in question by writ of certiorari is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

1. The First Amendment to the United States Constitution provides as follows: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

2. Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Sections 26-1, 26-4, 26-7(9), 26-8(b)(6), 26-8(c)(3), 26-8(c)(5), 26-8(c)(6), 26-8(c)(9), 26-8(c)(10), 26-16, 26-17, 26-26, 26-27 and 26-28 of the Douglasville, Georgia sign ordinance. Because the aforesaid provisions are lengthy, the text of these sections of the Douglasville, Georgia sign ordinance are set forth in the appendix attached hereto.

4. 42 U.S.C. § 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner owns real estate located in the City of Douglasville, Georgia, which is located in the central business district adjacent to a United States highway and across the road from the railroad tracks. The City of Douglasville has designated most of the central business area as an "historic district." Petitioner operates an automobile paint and body shop on his property and has erected an on-premise sign identifying his place of business.

In 1988, petitioner was approached by Adams Outdoor Advertising of Atlanta, Inc., Jimbo Displays, Inc. and Holland Outdoor Displays, Inc. These three corporations sought to lease a site on petitioner's property for the erection of an off-premise advertising sign, i.e. a sign either advertising products, services or activities not sold or conducted on the premises or conveying a noncommercial message. Adams Outdoor is engaged in the outdoor advertising business in the Atlanta, Georgia, metropolitan area. Jimbo Displays, Inc. and Holland Outdoor Displays, Inc. construct outdoor advertising structures and sell them to others.

Petitioner leased a portion of his property to Jimbo Displays for the erection and maintenance of an off-premise advertising structure. The City of Douglasville issued a permit for an off-premise advertising sign to be placed on petitioner's tract, but because the sign was not placed in the exact location allowed by the permit, the City later revoked the permit and stated that it considered the sign to be in violation of the City's ban on off-premise advertising signs in the Douglasville historic district. George Holland, an officer of Jimbo Displays and Holland Outdoor, appealed the permit revocation to the Douglasville Board of Adjustments and Appeals, but the appeal was denied. The sign was then removed.

B. History of Proceedings

This action was commenced by the filing of a complaint on July 12, 1990, in the United States District Court for the Northern District of Georgia, Atlanta Division. Jurisdiction was based upon 28 U.S.C. §§ 1331, 1343 and 2202.

The complaint was brought in four counts. Count I is a First and Fourteenth Amendment facial challenge to a number of provisions of the Douglasville, Georgia, sign ordinance. Count II is a Due Process challenge to certain provisions of the Douglasville sign ordinance which petitioner believes fail to provide any objective standards to guide the Board of Adjustments and Appeals in determining when a variance should be granted. Count III is a claim for damages pursuant to 42 U.S.C. § 1983, and count IV seeks an injunction preventing the City of Douglasville from issuing a threatened citation against the petitioner. It is only the First and Fourteenth Amendment allegations contained within count I of the complaint which are the subject of this petition for certiorari.

On February 4, 1991, petitioner filed a motion for summary judgment to which the respondent replied and filed a cross-motion. By order entered on June 26, 1991, the

district court ruled that the ordinance does not discriminate against noncommercial speech as opposed to commercial speech in violation of the First and Fourteenth Amendments. The district court also ruled that petitioner lacked standing to challenge the variance powers given to the Douglasville Board of Adjustment and Appeals. With respect to petitioner's remaining First and Fourteenth Amendment challenges, the district court held that petitioner had standing and directed the respondent to brief those issues on the merits.

Following additional briefs by both parties, in an order entered on September 25, 1991, the district court granted the remainder of the respondent's motion for summary judgment. The district court's orders were affirmed by the United States Court of Appeals for the Eleventh Circuit in *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992).

REASONS FOR GRANTING THE WRIT

I. THE WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS ON THE SAME MATTER AND IS IN CONFLICT WITH CONTROLLING PRECEDENT OF THIS COURT.

The initial question considered by the Eleventh Circuit was whether the prohibition on all signs in the Douglasville historic district, except for those directing attention to products, services, activities or entertainment conducted, sold or offered on the premises on which the sign is located, constitutes an unconstitutional preference for commercial over noncommercial signs and an unconstitutional prohibition on the conveyance of ideas in violation of the First and Fourteenth Amendments. In considering this question, the Eleventh Circuit aligned

itself with the decision reached by the Sixth Circuit in *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007, 108 S.Ct. 702, 98 L.Ed.2d 653 (1988), in finding that the Douglasville sign ordinance is viewpoint neutral. The decisions of the Eleventh Circuit, and the Sixth Circuit in *Wheeler*, are in direct conflict with the decisions of the First Circuit in *Ackerley Communications of Massachusetts, Inc. v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989), and the Second Circuit in *National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2nd Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 146 (1990). *See also National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 n.3 (9th Cir. 1988) (without deciding the question before this Court, the Ninth Circuit noted that the plurality opinion in *Metromedia*, *infra*, suggests an on-site/off-site distinction between noncommercial messages like the one enacted by Douglasville would be invalid).

Furthermore, the decisions reached by the Sixth Circuit in *Wheeler* and by the Eleventh Circuit are in direct contradiction to this Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). This Court should grant certiorari in this case to resolve the conflict among the Circuit Courts of Appeals and to correct the erroneous decision of the Eleventh Circuit.

The starting point for any analysis of an ordinance regulating the placement of advertising signs must be this Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). In *Metromedia*, the Court struck down an ordinance which prohibited most outdoor advertising signs. The ordinance exempted two types of signs: (i) on-site signs, defined as signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises, or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed; and (ii)

certain specific types of signs, described by the Court as including government signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, but not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and temporary political campaign signs. 453 U.S. at 494-95, 101 S.Ct. at 2886. In finding the San Diego ordinance unconstitutional in a plurality opinion, the Court reached three significant conclusions.[1]

First, it held that San Diego was free to place a greater value upon on-site commercial advertising than on the interests underlying the general ban on billboards, which were traffic safety and aesthetics. *Id.* at 512, 101 S.Ct. at 2895 ("The city has decided that in a limited instance —on-site commercial advertising—its interests should yield. We do not reject that judgment"). *See also id.* at 541, 564-65, 569-70, 101 S.Ct. at 2909, 2921-22, 2924. Thus, San Diego could constitutionally exempt some signs from the general ban.

Second, the Court held that the city could exempt on-site commercial signs without also exempting off-site commercial signs. 453 U.S. at 512, 101 S.Ct. at 2895 (". . . the city could reasonably conclude that a commercial enterprise—as well as the interested public—has a stronger interest in identifying its place of business and advertising the products or services available there that it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere"). *See also id.* at 541, 564-65, 569-70, 101 S.Ct. at 2909, 2921-22, 2924. Thus, a majority saw no consti-

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[1] Each of these had support from at least five justices, although not from the same configuration.

tutional problem in distinguishing between on-site and off-site commercial speech.

Third, the Court held that San Diego could not prohibit the display of noncommercial messages in places where commercial billboards were permitted. Once the City had decided that its interests in on-site commercial advertising outweighed its interests in aesthetics and traffic safety, and therefore that certain billboards should remain despite their safety and aesthetic consequences, it could not then restrict the content of those billboards to commercial messages. The plurality stated as follows:

> Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.

453 U.S. at 513, 101 S.Ct. at 2895 (footnote omitted).

The Douglasville ordinance before this Court violates the third holding of *Metromedia* because, due to its definitions of on-site and off-site signs, it prohibits the display of noncommercial messages in places where commercial signs are permitted. An on-premise sign, as defined in Section 26-4 of the ordinance, always directs attention to a building, profession, product, service, activity or entertainment conducted, sold or offered on the property upon which the sign is located. As a result, an on-premise sign can bear a noncommercial message only in the rare instance in which the premises on which it is placed is the local office of a noncommercial enterprise. Noncommercial enterprises which do not have local offices in the City of Douglasville are prohibited from placing messages on any signs in the central business district and certain other areas of the City. Display of noncommercial speech should not be limited to premises connected with the noncommercial activity because ideas, political causes and social issues rarely have an office.

By their definition, off-premise advertising signs direct attention to a building, profession, product, service, activity or entertainment not conducted, sold or offered on the property upon which the sign is located. Sign ordinance § 26-4. Accordingly, except in the limited instances where noncommercial enterprises have offices in the City of Douglasville, the ordinance prohibits the display of noncommercial messages (which must be placed on off-premise signs) in all areas of the City where off-premise signs are prohibited, while allowing the posting of commercial messages on-premise signs in all of those areas. As a result, the discrimination imposed by the sign ordinance in favor of on-premise signs against off-premise signs violates the holding of *Metromedia*.

The sign ordinance favors on-premises signs over off-premise signs in at least eight ways. The first manner in which the ordinance discriminates in favor of on-premise signs is found in Section 26-28(7) of the ordinance. That section of the ordinance prohibits the placement of off-premise advertising signs in an area of the City of Douglasville known as the Douglasville Historic District. Section 26-27(3) of the sign ordinance allows on-premise commercial signs within the Douglasville Historic District. The result of these provisions of the ordinance is that petitioner is prohibited by the sign ordinance from posting a noncommercial message on the sign allowed on his property, while he may continue to maintain the commercial sign on his property advertising his automobile body shop.

Second, the ordinance discriminates against off-premise advertising signs by the provisions of Section 26-27(9) which prohibit the placement of those signs within 300 feet of any officially designated historical site or monument. No similar prohibition is enforced against on-premise signs. As a result, Section 26-7(9) of the ordinance discriminates against off-premise signs, which may bear noncommercial messages, in favor of on-premise signs, which are limited to commercial messages.

Third, the ordinance discriminates against noncommercial messages in Section 26-8(c)(5) by requiring that off-premise signs be no less than 1,000 feet apart in a number of instances, while there is no spacing requirement for on-premise commercial signs.

Fourth, the ordinance requires in Section 26-8(c)(6) that off-premise signs located adjacent to the interstate highway right-of-way shall be no less than 1,000 feet apart while no such restriction is imposed upon on-premise signs. As a result, since under Section 26-8(c)(5) of the ordinance the owner of a lot where a business, profession, product, service, activity or entertainment is conducted, sold or offered must choose between placing an on-premise commercial sign or off-premise noncommercial sign on his lot, in those instances where the owner's lot is adjacent to an interstate highway and is within 1,000 feet of an existing off-premise sign, the owner has no choice but to erect an on-premise commercial sign. He is barred by the sign ordinance from erecting a noncommercial off-premise sign in that instance. This results in discrimination in favor of commercial advertising signs against noncommercial advertising signs.

Fifth, Section 26-8(c)(5) of the ordinance limits the number of off-premise signs at an interchange adjacent to an interstate highway to two, but the sign ordinance provides no limitation on the number of on-premise signs at such interchanges. This limitation discriminates in favor of commercial advertising signs and against noncommercial advertising signs.

Sixth, Section 26-8(b)(6) of the ordinance allows commercial signs advertising a product or service of specific interest to the motoring public such as automobile service stations, restaurants and motels to be up to 70 feet high, while Section 26-8(c)(3) of the sign ordinance requires that other off-premise signs which may bear noncommercial messages be no more than 30 feet in height.

Seventh, Section 26-8(c)(9) of the ordinance prohibits off-premise signs which may bear noncommercial messages from being placed in marshlands and prohibits them from obstructing the view of marshlands, while the ordinance contains no such prohibition on on-premise signs which must bear commercial messages.

Eighth, Section 26-8(c)(10) of the ordinance prohibits off-premise signs which may bear noncommercial messages from being placed within 200 feet of the property line of a residence, church, school, park or public building, while the ordinance contains no similar prohibition on the placement of on-premise signs.

In each of the above-referenced instances, the sign ordinance attempts to elevate the communication of commercial information (on-premise signs) over the communication of noncommercial messages (off-premise signs). Thus, the ordinance concludes that the communication of commercial information is of greater value than the communication of noncommercial messages when it prohibits the placement of noncommercial signs within the Douglasville historic district; when it prohibits the placement of noncommercial signs within 300 feet of any officially designated historical site, while allowing the placement of commercial signs within the prohibited zone; when it requires that signs bearing noncommercial messages be no less than 1,000 feet apart, while containing no prohibition on the spacing of signs bearing commercial messages; when it prohibits the placement of off-premise signs on certain lots, while allowing on-premise signs on those lots; when it limits the number of off-premise signs at an interchange adjacent to an interstate highway to two, while providing no such limitation on the number of commercial signs at such interchanges; when it allows certain commercial signs added visibility by allowing them to be placed up to 70 feet high, while requiring that signs bearing noncommercial messages be no more than 30 feet in height; when it prohibits signs which may bear noncommercial messages from being

placed in marshlands and from obstructing the view of marshlands, while containing no such prohibition on signs bearing commercial messages; and when it prohibits signs which may bear noncommercial messages from being placed within 200 feet of the property line of a residence, church, school, park or public building, while containing no similar prohibition on the placement of signs which may bear commercial messages. Each of these provisions of the ordinance is directly in violation of the holding of *Metromedia* that a city may not conclude that the communication of commercial information is of greater value than the communication of noncommercial messages. Accordingly, the sign ordinance violates the First and Fourteenth Amendments and should be declared unconstitutional by this Court.

The Eleventh Circuit Court of Appeals concluded that the Douglasville ordinance is distinguishable from the ordinance declared unconstitutional by the *Metromedia* ruling and upheld the ordinance based upon the Sixth Circuit's decision in *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007, 108 S.Ct. 702, 98 L.Ed.2d 653 (1988). This conclusion is erroneous.

In *Wheeler*, the Sixth Circuit found that a state statute and regulations were valid place and manner restrictions on billboards notwithstanding the plaintiff's arguments that they violated the Supreme Court's holding in *Metromedia*. The regulations in issue prohibited the placement of billboards in certain areas while allowing the erection of on-premise signs in those areas that contained a message relating to an activity or the sale of a product on the property on which they were located. 822 F.2d at 587-88. Noting that messages such as "abortion is murder" or "no-nukes" are permissible if an activity related to the messages was conducted on the premises, the Sixth Circuit found that the restrictions in issue permitted commercial and noncommercial signs in protected areas as long as the signs related to an activity on the premises. *Id.* at 590. As a result, the Sixth Circuit con-

cluded that the regulations before it were content neutral. *Id.* Adopting this analysis, the Eleventh Circuit found the Douglasville ordinance to be content neutral. Ignoring reality, the court held that "there is simply no basis for equating on-premise signs with commercial speech, and off-premise signs with noncommercial speech." 975 F.2d at 1509. The court came to this conclusion even though it conceded in the example it offered in support of its analysis that the only kind of noncommercial message petitioner could place on his own on-premise sign would be one related to the repair or maintenance of automobiles.[2] 975 F.2d at 1509. The court ignored altogether petitioner's point that he should be able to place any noncommercial message on his sign, not just one re-relating to the repair or maintenance of automobiles.

The Sixth Circuit's opinion in *Wheeler* and the Eleventh Circuit's reliance on it were error because the *Wheeler* court's analysis squarely conflicts with this Court's pronouncement in *Metromedia*. In *Metromedia*, this Court stated as follows:

> It does not follow, however, that San Diego's general ban on signs carrying noncommercial advertising is also valid under the First and Fourteenth Amendments. The fact that the City may value commercial messages relating to on-site goods and services more than it values commercial communications relating to off-site goods and services does not justify prohibiting an occupant from displaying its own ideas *or those of others.*

453 U.S. at 512-13, 101 S.Ct. at 2895.

The teaching of *Metromedia* is that if an occupant is allowed to display any sign, he may not be prohibited from displaying his own ideas or those of others. The noncommercial speech allowed by the Kentucky on-premise sign regulation in the *Wheeler* case (which was

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[2] The court stated that an auto mechanic's garage would be able to put up a noncommercial message relating to the recycling of used motor oil. 975 F.2d at 1509.

restricted to an activity conducted on the premises) is the identical noncommercial speech allowed by the City of Douglasville in this case (i.e., the speech is restricted to an activity conducted on the premises). Neither the Kentucky regulation nor the Douglasville ordinance allows the property owner to display his own ideas or the ideas of others. The ordinance before this Court and the statute before the court in *Wheeler* limit the expression of ideas to those related to activities being conducted on the premises. That being the case, the Douglasville ordinance (as did the regulations before the *Wheeler* court) violates the mandate contained in *Metromedia* that any person allowed to erect a sign must be allowed to display his own ideas or those of others. Accordingly, the decision of the Eleventh Circuit below contradicts the decision of the Supreme Court in *Metromedia* and should be reversed by this Court.

The First Circuit interpreted *Metromedia* in *Ackerley Communications of Massachusetts, Inc. v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989). In paraphrasing the Supreme Court's conclusion with respect to noncommercial messages, the *Ackerley* court stated as follows:

> *In other words, if the owner of Joe's Hardware wants to replace his "Joe's Hardware" sign with a sign saying "No Nukes", he must be allowed to do so.* This result follows logically from the First Amendment's value structure; if a commercial message overrides the city's aesthetics and safety interests, any message that is at least as important in the first amendment hierarchy also must override those interests. Because noncommercial speech is entitled to a higher degree of protection than commercial speech, San Diego could not decide that its aesthetic and safety interests were outweighed by the need to express commercial messages but not by the need to express noncommercial messages.

Id. at 517 (emphasis added).

As noted in *Ackerley*, because noncommercial speech is entitled to a higher degree of protection than commercial speech, the owner of any store must be able to replace his commercial on-site sign with a sign bearing any noncommercial message. That is prohibited by the Douglasville sign ordinance because the ordinance restricts the content of messages on on-premise signs by requiring that each of them direct attention to a building, profession, product, service, activity or entertainment conducted, sold or offered on the property upon which the sign is located. This prohibition violates the holding of *Metromedia* as clearly analyzed in *Ackerley*. *See also National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 n.3 (9th Cir. 1988).

The Second Circuit used identical reasoning in holding unconstitutional a sign ordinance adopted by the Town of Islip, New York. *National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2nd Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 146 (1990). The Islip ordinance provided that on-premise signs "may only identify the person, establishment, the principle [sic] product and/or services available on the premises which contain the sign." 703 F. Supp. at 238. The Islip limitation on on-premise signs mirrors the Douglasville limitation upheld by the Eleventh Circuit in this case. In considering a *Metromedia*-based challenge to this portion of the ordinance, the district court stated as follows:

> Several of the defendants argued that the portions of their respective ordinances which allow only signs advertising the business conducted on the premises are merely content-neutral time, place, and manner restrictions. This court squarely rejects this contention. In addition to directly contradicting the plurality's opinion in *Metromedia*, this line of reasoning is internally flawed. By their own terms, the ordinances regulate according to the subject matter of the sign, *i.e.*, only a message concerning the business of that location is allowed. Therefore, under

> the ordinances as they exist, "Joe," for example, may put up a sign on his pizzeria saying "Joe's Famous Pizza" but may not put up a sign in the same spot, of the same size, using identical lettering and colors, expressing his view that "abortion is murder." Nor may he lease this same sign to "Bill" to publicize his message that "free choice is the only choice." Thus, whether the sign is permitted depends solely upon the content of the message being conveyed.

703 F. Supp. at 239-40. Citing *Metromedia*, the Second Circuit affirmed the district court's order with respect to the Islip ordinance, finding it "defective because it impermissibly discriminates against noncommercial speech in favor of commercial speech." 900 F.2d at 556. Thus, without making an express reference to the decision of the First Circuit in *Ackerley* or of the Sixth Circuit in *Wheeler*, the Second Circuit adopted the analysis of the First Circuit in *Ackerley* and rejected the analysis of the Sixth Circuit in *Wheeler*. The panel's decision in *Town of Babylon* was followed by another Second Circuit panel in *National Advertising Co. v. Town of Niagara*, 942 F.2d 145 (2nd Cir. 1991), which affirmed a district court's decision holding the sign ordinance of the Town of Niagara in violation of the First Amendment. The *Niagara* panel noted that due to the limitation on the content of on-site advertising to a description of business transacted, services rendered, or goods sold and produced on the premises where the sign is located, "a property owner could erect a sign that said 'Fried Chicken Sold Here' but not one saying 'Save the Whales'. . . ." The Second Circuit agreed with the district court that the ordinance violated the First Amendment and invalidated the ordinance as a whole. 942 F.2d at 146.

In addition to the First and Second Circuits, other courts have applied *Metromedia* and declared ordinances similar to the Douglasville ordinance to be unconstitutional. One case in particular, *Metromedia, Inc. v. Mayor and City Council of Baltimore*, 538 F. Supp. 1183 (D.Md.

1982), contains facts strikingly similar to those in the case at bar. In *Mayor and City of Council of Baltimore*, a city ordinance was challenged because it prohibited signs other than on-premises signs in a particular area of the city just as the Douglasville ordinance prohibits off-premises signs, but allows on-premise signs, in the Douglasville historic district. The district court held in *Mayor and City Council of Baltimore* that the ordinance was constitutionally defective in one of the ways that the *Metromedia* court found the San Diego ordinance defective, that being in its discrimination against noncommercial messages. *Id.* at 1187. The flaw in the Baltimore ordinance was that an owner or occupant within the affected area could affix a sign identifying his premises, just as the petitioner may in the case at bar, but could not affix a sign displaying his ideas or those of others. *Id.* The exact same result obtains under the challenged Douglasville ordinance; consequently, the Douglasville ordinance is also unconstitutional.[3]

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[3] The *Wheeler* court attempted to distinguish *Mayor & City Council* by characterizing the ordinance in issue there as one which allowed an owner or occupier of land within the affected area to affix a sign identifying the premises, but prohibiting signs displaying messages other than identification of the premises. 822 F.2d at 594. The *Wheeler* court misread the Baltimore ordinance in issue in *Mayor & City Council* for in section 3(4)(a) it clearly allowed signs "identifying the property where they are installed *or identifying the use conducted thereon* . . . ." 538 F. Supp. at 1185 (emphasis added). As a result, the Baltimore ordinance stricken in *Mayor & City Council* was exactly like the ordinance reviewed by the *Wheeler* court, even though the *Wheeler* court believed it was different. Like the signs in *Wheeler*, a sign erected in the Midtown Belvedere area of Baltimore could carry a "George Wallace for President" message if activity in support of his candidacy was conducted on the premises, but was prohibited from carrying that message if it were not. The ordinance was stricken in *Mayor & City Council* because it prohibited a shop owner's communication of a message not relating to his premises; the same deficiency appearing in the Douglasville ordinance before this court and in the Kentucky regulation upheld in *Wheeler*. 538 F. Supp. at 1187.

Other sign ordinances stricken as being unconstitutional under the *Metromedia* holding include the ordinances challenged in *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985); *Jackson v. City Council of Charlottesville*, 659 F. Supp. 470 (W.D. Va. 1987), *modified on other grounds*, 840 F.2d 10 (4th Cir. 1988); *Adams Outdoor Advertising v. Newport News*, 373 S.E.2d 917 (Va. 1988); *Norton Outdoor Advertising, Inc. v. Village of Arlington Heights*, 69 Ohio State 2d 539, 433 N.E. 2d 198 (1982); and *Metromedia, Inc. v. City of Des Plaines*, 26 Ill. App. 3d 942, 326 N.E. 2d 59 (1st Dist. 1975). In these cases, courts applying the *Metromedia* holding have consistently stricken ordinances such as that enacted by the City of Douglasville which discriminate against noncommercial speech in favor of commercial speech. The City of Douglasville ordinance before this Court clearly favors commercial speech over noncommercial speech and certiorari should be granted in this case so that under the holding of *Metromedia* and its progeny the ordinance may be declared unconstitutional by this Court.

II. THE COURT OF APPEALS' DECISION UPHOLDING THE SECTION OF THE DOUGLASVILLE SIGN ORDINANCE WHICH ALLOWS THE PLACEMENT OF CERTAIN NONCOMMERCIAL MESSAGES WITHOUT A PERMIT, WHILE REQUIRING OTHERS TO BE PERMITTED, IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Douglasville sign ordinance further violates the First and Fourteenth Amendments because of the regulations contained in Section 26-17. That section allows the placement of certain noncommercial signs without a permit.[4] By enacting Section 26-17, the City of Douglasville

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[4] Section 26-17 of the Douglasville sign ordinance, which is reprinted in its entirety in the appendix, exempts from the permit fee requirements of the ordinance one wall sign per building side announcing the business located inside the building to which the sign

has determined to allow signs conveying certain noncommercial messages to be displayed without a permit, while denying that right to those posting other noncommercial messages. In *Metromedia*, this Court examined a similar list [5] of signs favored by the challenged San Diego ordinance and concluded as follows:

> With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse: "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison Co.*, 447 U.S. at 538, 100 S.Ct. at 2333.

453 U.S. at 515, 101 S.Ct. at 2896. Thus, the Court in *Metromedia* struck the challenged San Diego ordinance for containing a provision almost identical to Section 26-17 of the Douglasville ordinance. This provision is void because the Constitution forbids the selective restriction of protected noncommercial speech (by requiring certain

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is attached. The ordinance further exempts real estate "for sale" signs from both permit and permit fee requirements. In addition, no permit or permit fee is required for bulletin boards for public, charitable, educational or religious institutions when the sign is located on the premises of said institution. Also exempt from permit and permit fee requirements are project location signs denoting the architect, engineer, contractor or financial institution involved when placed upon work under construction. Finally, the ordinance exempts from the permit requirement signs directing traffic movement. Bulletin boards, which are referred to in Section 26-17 of the ordinance, are defined in Section 26-4 of the ordinance as "a sign which primarily displays the name of a noncommercial place of public assembly and announces the upcoming event(s) of that organization."

[5] Included were fixed signs, which could be used to identify any piece of property and its owner; signs displaying religious symbols, commemorative plaques of recognized historical societies and organizations; signs carrying news items or telling the time or temperature; signs erected in discharge of any government function; or temporary political campaign signs. 453 U.S. at 514, 101 S.Ct. at 2896.

noncommercial speech to obtain a permit while exempting other noncommercial speech) based on its content. Other courts[6] have stricken similar provisions based upon the holding of *Metromedia*, and this Court should grant certiorari in this case to correct the error committed by the Eleventh Circuit Court of Appeals in failing to strike this portion of the Douglasville ordinance.

III. SECTION 26-18 OF THE DOUGLASVILLE SIGN ORDINANCE IS VIOLATIVE OF THE FIRST AND FOURTEENTH AMENDMENTS BECAUSE THE BOND REQUIREMENT CONTAINED THEREIN IS NOT THE LEAST INTRUSIVE MEANS OF REQUIRING THE REMOVAL OF POLITICAL SIGNS AFTER AN ELECTION AND BECAUSE IT REGULATES POLITICAL SPEECH MORE STRINGENTLY THAN NONPOLITICAL SPEECH.

Section 26-18 of the Douglasville sign ordinance requires those persons interested in advertising or calling attention to a specific event, political candidate or political issue to obtain a temporary permit prior to posting a sign of that nature. A permit for such a sign will not be issued until the applicant files a bond by a licensed surety company or a cash bond in the amount of $500. *Id.* Applicants for all other types of permits are not required to post a bond (except for applicants for permits for portable display signs for special events). *Id.* Thus, applicants for political signs are burdened with a financial requirement not applicable to others.

Section 26-18 of the ordinance is a limitation on the fundamental right of political speech. The First Amendment has its fullest and most urgent application in the case of regulation of the content of political speech.

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[6] *National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2nd Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 146 (1990); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988); *Adams Outdoor Advertising v. Newport News*, 373 S.E.2d 917, 926 (Va. 1988).

Brown v. Hartlage, 456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971). Because the Douglasville bond requirement impinges political speech, it must be narrowly drawn and further a sufficiently substantial governmental interest. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). Furthermore, a court reviewing such an ordinance must not only assess the substance of the governmental interests asserted, but also determine whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment. *Id.*

The Eleventh Circuit concluded that the bond requirement is permissible for the reason that the regulation is not substantially broader than necessary. 975 F.2d at 1513. The court's conclusion is in conflict with the aforesaid test prescribed by this Court. Petitioner's application for a writ of certiorari should be granted so this error can be reversed.

The purpose of the bond requirement advanced by the City is the prevention of clutter. Without having introduced any evidence on the matter below, the City contended that the "only way to insure removal of (such) signs is to require a bond prior to the posting of any signs." The respondent's unsubstantiated argument is without merit because numerous less restrictive means of causing removal of temporary and political signs could be utilized. For example, the City could punish those who fail to remove their signs after an election or event. The names and addresses of those posting such signs could be required to be imprinted on each sign, as required under federal law, 11 C.F.R. § 110.11, so the City would know who to prosecute in the event of a violation. The same ordinance could provide that signs in violation of the identification requirement would be subject to immediate removal by the City.

In *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), this Court reviewed the antileafletting ordinances of four cities. Several municipalities argued that their antileafletting ordinances were designed to prevent littering of the streets. The Court did not deny that the ordinances would further that purpose, but it concluded that the cities' interest in preventing littering was not sufficiently strong to justify the limitation on First Amendment rights. The Court pointed out that the cities were free to pursue other methods of preventing littering, such a punishing those who actually threw papers on the streets. 308 U.S. at 162, 60 S.Ct. at 151. The Douglasville requirement of the posting of a $500 bond for an individual desirous of posting only one political sign as a means for keeping the City clean is unduly burdensome under *Schneider*, *supra*. For that reason, the Eleventh Circuit erred in upholding the requirement and certiorari should be granted to correct the error.

Another flaw in the bond requirement is the financial impact it has on an individual political candidate, especially a challenger to an incumbent for a local election. As stated in *Buckley v. Valeo*, 424 U.S. 1, 49 96 S.Ct. 612, 649, 46 L.Ed.2d 659 (1976), the "First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion".

While the very question in issue here has not squarely been confronted by the Supreme Court, it has been decided by the Ninth Circuit in a manner inconsistent with the Eleventh Circuit below. In *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976), *cert. denied*, 431 U.S. 913, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977), the ordinance under scrutiny required a $5.00 refundable removal deposit for posting a political sign. The Ninth Circuit found the removal deposit might, as a practical matter, preclude erection of all but a few large signs for some campaigns. The court concluded that "means less

restrictive of free expression must be relied upon to serve the interests of community tidiness and aesthetics." *Id.* at 1372. A subsequent decision of the Ninth Circuit invalidated an ordinance almost identical to the Douglasville ordinance requiring that any person posting political campaign signs must deposit a $100 cash bond with the city to insure removal of the signs. *Verrilli v. City of Concord*, 548 F.2d 262, 264, *modified on other grounds*, 557 F.2d 664 (9th Cir. 1977). The Fourth Circuit recently cited *Baldwin, supra*, and *Verrilli, supra*, in holding unconstitutional a sign ordinance limiting to two the number of temporary political campaign signs that could be posted on private property. *Arlington County Republican Committee v. Arlington County*, 983 F.2d 587 (4th Cir. 1993). The Fourth Circuit found that the challenged ordinance infringed on First Amendment rights because it was not narrowly tailored to further its substantial interests in promoting aesthetics and traffic safety and left no viable alernative means of political speech. 983 F.2d at 594-95. These decisions are in direct conflict with the decision of the Eleventh Circuit below, making this issue appropriate for the grant of a writ of certiorari under the rules of this Court.

The bond requirement of the Douglasville sign Ordinance must be stricken for the same reasons the ordinances were stricken in *Schneider, supra, Baldwin, supra*, and *Verrilli, supra*. The effect desired, the removal of signs following a political campaign, can be accomplished by much less restrictive means including the penalizing of those who fail to remove their signs. The Eleventh Circuit erred in refusing to follow the Ninth Circuit and hold this section of the ordinance unconstitutional.

In another case involving governmental restrictions on speech, *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), this Court applied equal protection analysis. There, the city had enacted an ordinance making it a misdemeanor to

picket or demonstrate on a public way within 150 feet of a school building, but allowing the peaceful picketing of any school involved in a labor dispute. The city arrested and charged a peaceful picketer for violation of the ordinance when he walked by a city school with a sign protesting the school's practice of racial discrimination. The Court noted that the city treated some picketing differently from other picketing and analyzed the ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment. The crucial question, the Court stated, was whether there was an appropriate governmental interest suitably furthered by the differential treatment. 408 U.S. at 95; 92 S.Ct. at 2290. The Court continued:

> There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. . . . Guided by these principles, we have frequently condemned discrimination among different users of the same medium for expression.

408 U.S. at 96, 92 S.Ct. at 2290. Under this analysis, the Court concluded that in the case before it the ordinance impermissibly discriminated among pickets based on the content of their expression and struck the ordinance under the Equal Protection Clause. *Id.* at 102, 92 S.Ct. at 2294. *See also Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) (analyzing statute under both First Amendment and equal protection approaches); *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983); *Bacon v. Bradley-Bourbonnais High School District*, 707 F.Supp. 1005, 1009-10 (C.D.Ill. 1989) (school district policy prohibiting all expressive activity on school premises except those of its own teachers violates individual's right to equal protection); L. Tribe, *American Constitutional Law*, 1459 (2nd Ed. 1988) (noting that

certain ordinances may be stricken under equal protection or due process analysis). Treating those desirous of posting political messages differently from those posting commercial messages, which the Douglasville ordinance does by requiring the former to post bonds while exempting the latter, violates the mandate of *Mosley* and the Equal Protection Clause by placing burdens on political speech not faced by commercial advertisers. Accordingly, petitioner's application for certiorari should be granted to correct the error of the Eleventh Circuit in failing to strike Section 26-18 of the Douglasville sign ordinance as violative of the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

This case is appropriate for the grant of a writ of certiorari under Sup. Ct. R. 10.1(a) and (c) because the Eleventh Circuit Court of Appeals and the Sixth Circuit Court of Appeals have rendered important decisions on a First Amendment issue in conflict with the decisions of the First and Second Circuit Courts of Appeals on the same matter and have decided a federal question in a way that conflicts with a controlling decision of this Court, *i.e.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). Furthermore, with respect to the provisions of the challenged ordinance requiring a bond as a condition precedent to the issuance of a permit allowing a political sign, the Eleventh Circuit has rendered a decision in conflict with the decision of the Ninth Circuit Court of Appeals on the same matter and has decided a federal question in a way that conflicts with applicable decisions of this Court, *i.e.*, *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), and *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), among others. For these reasons, petitioner

respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

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March 25, 1993

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APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-8941

JAMES G. MESSER,
Plaintiff-Appellant,

v.

CITY OF DOUGLASVILLE, GEORGIA,
a political subdivision of the State of Georgia,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

Oct. 22, 1992

Before DUBINA, Circuit Judge, and HILL and CLARK, Senior Circuit Judges.

CLARK, Senior Circuit Judge:

This case concerns the constitutionality of various aspects of the sign ordinance of the City of Douglasville. For the reasons stated below, we affirm the district court in finding the ordinance constitutional.

I. FACTS AND PROCEDURAL BACKGROUND

The plaintiff, James Messer, owns an automobile paint and body shop within the historic district of Douglasville, Georgia. In 1988, he leased rights to construct a billboard on his property to Adams Outdoor Advertising of Atlanta, Inc. ("Adams") an outdoor advertiser, Jimbo Displays, Inc. ("Jimbo") and Holland Outdoor Displays, Inc. ("Holland") companies that construct and erect outdoor advertising signs, or billboards. Jimbo obtained a permit from the City of Douglasville for an off-premise billboard on a specific site. The permit was to expire on August 13, 1989. Jimbo and Holland then erected the billboard but 30 feet off the site approved by the city.

On April 17, 1989, the City of Douglasville enacted a sign ordinance prohibiting off-premise signs in the historic district of Douglasville. Subsequent to the enactment of the ordinance, the city became aware that the sign on Messer's property was not at the approved site. It informed Jimbo and Holland that the existing sign was not permitted and therefore could not continue in existence as a non-conforming sign. A new permit could not be issued because of the new ordinance.

Jimbo and Holland requested a hearing before the Board of Adjustments and Appeals, asking that the sign be permitted. The Board affirmed the decision of the building officer denying the permit on April 6, 1990. Two months later, on July 10, 1990, Adams contracted with Jimbo and Holland to purchase the sign located on Messer's property, and entered into a lease agreement with Messer contingent on the results of this action.

Two days later, on July 12, 1990, Messer, Holland, Jimbo and Adams filed this § 1983 suit against the City of Douglasville, alleging the prohibition of off-premise advertising in the historic district of the City of Douglasville and other aspects of the City's sign ordinance violates the First Amendment and the Equal Protection Clause of the

Fourteenth Amendment. Pursuant to a subsequent consent order, the district court dismissed Adams, Jimbo and Holland with prejudice, leaving Messer to prosecute this action alone.

Messer challenged five aspects of Douglasville's sign ordinance. The relevant portions of the Douglasville sign ordinance are set out in the margin *infra*. First, Messer argued that the section of the ordinance allowing only on-premise signs and disallowing off-premise signs in the historic district of Douglasville impermissibly favored commercial over noncommercial speech in that district. Second, he argued that because an ordinance covering the entire city of Douglasville allowed exemptions for certain types of signs from the permit requirements and not others, it was not content neutral in its regulation of non-commercial speech. Third, he asserted that the temporary permit provisions mandating cash bonds from persons seeking to put up temporary signs favored commercial over political speech. Fourth, he contended that the portable display provisions of the ordinance violated the First Amendment. Finally, he argued that the variance powers invested in the city's Board of Appeals and Adjustments violated due process.

In an order dated June 26, 1991, the district court granted summary judgment to the city on the first issue. It held that the ordinance did not impermissibly favor commercial over non-commercial speech by allowing on-premise signs but not off-premise signs. The court found that Messer did not have standing to challenge the variance powers of the Board of Appeals, as he suffered no real injury, and had not asked the Board for a hearing. The only hearing that took place had been requested by Mr. Holland on behalf of Jimbo and Holland, the billboard corporations.

In an order filed September 25, 1991, the district court granted summary judgment to the City on the remaining

issues. It found that the exemptions to the permit requirements did not violate the First Amendment because they were not *restrictions* on commercial speech. The temporary permit provisions were also constitutional as they were not substantially broader than necessary to achieve the government's aesthetic interest in prompt removal of the signs. The portable display provisions were also constitutional as they were rationally related to the government's interest in the aesthetics of the city.

II. DISCUSSION

A. *Off-premise signs*

The Douglasville sign code prohibits off-premise signs [1] throughout the historic district of the City of Douglasville,[2] and in various specific locations.[3] In addition to

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[1] The City of Douglasville, Ga. Code § 26 (1989) states:

Sec. 26-4. Definitions

Off-premise advertising sign: A sign which directs attention to a building, profession, product, service, activity, or entertainment not conducted, sold, or offered on the property upon which the sign is located.

On-premise sign: A sign which directs attention to a building, profession, product, service, activity, or entertainment conducted, sold, or offered on the property upon which the sign is located.

. . . .

Sign: Any name, identification, description, display, illustration, or device which is affixed to or represented directly or indirectly upon the exterior of a building, structure, or land in view of the general public which directs attention to a product, place, activity, person, business or institution.

[2] Sec. 26-28. Prohibited signs.

The following signs are prohibited within the Douglasville Historic District unless specifically permitted as a temporary sign:

. . . .

(7) Off-premise or separate use signs.

[3] Sec. 26-7. Prohibited signs.

. . . .

[Continued]

challenging the ordinance relating to off-premise signs in the Historic District, Messer argues that the regulations in Secs. 26-7, 26-8(b)(6) and (c)(3), (5), (6), (9) and

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[3] [Continued]

(9) No off-premise sign shall be located within three hundred (300) feet of any officially designated historical site or monument, except signs pertaining to that particular site.

Sec 26-8. Special regulation by type of sign.

(b) *Freestanding on-premise signs*

. . . .

(6) *Height Requirements:*

The height of all on-premise free-standing signs at their highest point above the level of the ground shall not exceed fifty (50) feet; provided; however, that a sign located on property adjacent to or within five hundred (500) feet of a federal interstate highway which advertises a product or service of specific interest to the motoring public, such as automobile service stations, restaurants and motels, may be seventy (70) feet at its highest point; however, if the ground is lower than the level of the adjoining street pavement, then a sign may be raised so as to be no more than twenty-five (25) feet above the level of the pavement. The level of the ground shall not be altered in such a way as to provide additional sign height. The height of all wall, canopy and roof signs at their highest point above ground level shall be as provided by the standards of the applicable zoning district.

(c) *Off-premise signs in general:*

. . . .

(3) *Height above interstate grade.*

All signs adjacent to the interstate highway right-of-way shall be a minimum of ten (10) feet above the adjacent interstate pavement measuring from the lower portion of the sign face. Signs shall not exceed thirty (30) feet in height. Two (2) signs in the same location (back to back) or in a "V" formation shall be the same height above the interstate surface.

. . . .

(5) . . . Only one sign on-premise or off-premise shall be allowed per lot frontage where a business, profession, product, service, activity, or entertainment is conducted, sold, or offered.

. . . .

[Continued]

(10) of the Douglasville Code unconstitutionally favor commercial over noncommercial speech.

1. The Historic District of Douglasville

There is a complete ban on off-premise signs in the historic district in the City of Douglasville. Appellant Messer argues that this ordinance favoring on-premise over off-premise signs also favors commercial speech over noncommercial speech, thus violating the First Amendment as interpreted by *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981).

The *Metromedia* plurality held that regulation favoring on-site commercial advertising over off-site commercial advertising was permissible, but regulation favoring on-site commercial over non-commercial speech was impermissible. *Metromedia*, 453 U.S. at 511-12, 101 S.Ct. at 2894-95. A landowner or commercial enterprise has much more significant interest in identifying or advertising its own business or products than in advertising the products of others. Thus, a governmental entity may restrict the landowner's interest in advertising the products of others in the interests of aesthetics and safety, while leaving the landowner's interest in advertising its own business intact. However, this does not justify disallowing noncom-

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[3] [Continued]

(6) *Spacing on the interstate.*

Sign locations on property adjacent to the interstate highway right of way shall be no less than one thousand (1000) feet apart, measured from the two (2) closest points.

. . . .

(9) *Marsh area prohibitions.*

No sign shall be placed in or obstruct the view of marshlands.

(10) Signs shall not be placed within two hundred (200) feet of the property line of a bona fide residence, church, school, park or public building, as measured by the two (2) closest points.

mercial billboards where commercial billboard are allowed. The court stated:

> The fact that the city may value commercial messages relating to onsite goods and services more than it values commercial communications relating to offsite goods and services does not justify prohibiting an occupant from displaying its own ideas or those of others.
>
> . . . .
>
> Insofar as the city tolerates billboards at all, it cannot choose to limit their contents to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.

Metromedia, 453 U.S. at 513, 101 S.Ct. at 2895.

The Court, however, did not distinguish between onsite and offsite *noncommercial* messages. Thus, it did not directly address the question now before us: whether a regulation allowing onsite noncommercial signs while denying offsite noncommercial signs would be constitutionally permissible.

We must first decide whether such an ordinance seeks to regulate speech according to its content. It is well settled that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984). In *Vincent*, the Court ruled the sign ordinance at issue "viewpoint neutral" as

> [T]here is not even a hint of bias or censorship in the City's enactment of enforcement of this ordinance. There is no claim that the ordinance was de-

> signed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express. The test of the ordinance is neutral—indeed it is silent—concerning any speaker's point of view.

Vincent, 466 U.S. at 804, 104 S.Ct. at 2128 (citations omitted).

We find that the City of Douglasville's sign ordinance prohibiting off-premise billboards is similarly viewpoint neutral. It regulates signs not based on the viewpoint of the speaker, but based on the location of the signs. There is no claim of bias, censorship or preference regarding a speaker's point of view. The ordinance does not favor commercial over non-commercial speech; neither does it favor non-commercial over commercial speech. Contrary to Messer's argument, there is simply no basis for equating on-premise signs with commercial speech, and off-premise signs with noncommercial speech. A noncommercial enterprise would be able to put up a sign bearing a noncommercial message as long as it relates to any activity on the premises. Similarly, a commercial enterprise would be able to put up a sign bearing a noncommercial mesage which related to any activity on the premises. For example, an auto mecahnic's garage would be able to put up a noncommercial message relating to the recycling of used motor oil. *Accord Wheeler v. Commissioner of Highways*, 822 F.2d 586, 591 (6th Cir.1987), *cert. denied*, 484 U.S. 1007, 108 S.Ct. 702, 98 L.Ed.2d 653 (1988) (a distinction between onsite and offsite noncommercial signs is constitutionally permissible); *National Advertising Co. v. Chicago*, 788 F.Supp. 994, 997-98 (N.D.Ill.1991) ("the distinction between on-site and off-site advertising is not aimed toward the suppression of an idea or viewpoint"); *see Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295, 104 S.Ct. 3065, 3069-70, 82 L.Ed.2d 221 (1984) (general ban on camping in park upheld); *Heffron*

v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 648-49, 101 S.Ct. 2559, 2564-65, 69 L.Ed.2d 298 (1981) (regulation requiring all dissemination of ideas to be made from fixed locations within state fair upheld); *cf. National Advertising Co. v. Orange*, 861 F.2d 246, 248 (9th Cir.1988) (court dismissed but did not decide the issue because it struck ordinance based on system of exemptions); *contra Burkhart Advertising, Inc. v. Auburn*, 786 F.Supp. 721, 732 (N.D.Ind.1991) (ban on off-premise signs is not content neutral because "[i]t prohibits all kinds of speech because of what it *says*"); *Metromedia, Inc. v. Mayor & City Council of Baltimore*, 538 F.Supp. 1183, 1187 (D.Md. 1982) (identification signs only ordinance was not content neutral because "an owner or occupier within the area may affix a sign identifying his premises but may not affix a sign displaying his ideas or those of others").

The Sixth Circuit, upholding a similar ordinance prohibiting off-premise advertising signs, stated:

> [T]he on-premise/off-premises distinction does not constitute an impermissible regulation of content just because the determination of whether a sign is permitted at a given location is a function of the sign's message. Kentucky, by allowing persons who own or lease property, to have a sign, subject to size and space restrictions, advertising an activity conducted on the property is not favoring one message over another. The state has simply recognized that the right to advertise an activity conducted on-site is inherent in the ownership or lease of the property.

Wheeler, 822 F.2d at 591.

Having decided that the ordinance is viewpoint neutral, we must next decide if the government's interests justify this regulation of noncommercial speech. Time, place and manner restrictions are permissible if "they are justified without reference to the content of the regulated speech,

. . . serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976). In *Vincent, supra*, the Court stated:

> [A] government regulation is sufficiently jusified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the interest.

Vincent, 466 U.S. at 805, 104 S.Ct. at 2128, *quoting United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968). Thus, to uphold a viewpoint neutral regulation of speech, a government must show that 1) it has the constitutional power to make the regulation, 2) an important or substantial government interest unrelated to the suppression of free speech is at stake, and 3) the ordinance is narrowly drawn to achieve its desired ends, leaving other channels for the communication of information.

It is well settled that the state may legitimately exercise its police powers to advance its aesthetic interests. *Vincent*, 466 U.S. at 805, 104 S.Ct. at 2129. It is also well settled that both traffic safety and aesthetics are substantial governmental goals. *Vincent*, 466 U.S. at 807, 104 S.Ct. at 2130. The Court in *Vincent* also affirmed *Metromedia* as holding that a city's aesthetic interests are sufficiently substantial to provide an acceptable justification for a content neutral prohibition against the use of billboards. *Vincent*, 466 U.S. at 806-07, 104 S.Ct. at 2130.

A government has a more significant interest in the aesthetics of designated historical areas than in other

areas. In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 107-08, 98 S.Ct. 2646, 2651, 57 L.Ed.2d 631 (1978), the Supreme Court recognized that

> These nationwide legislative efforts [to designate historic sites and landmarks] have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all.

Similarly, Justice Brennan, concurring in *Metromedia*, wrote:

> I have little doubt that some jurisdictions will easily carry the burden of proving the substantiality of their interest in aesthetics. For example, the parties acknowledge that a historical community such as Williamsburg, Va. should be able to prove that its interest in aesthetics and historical authenticity are sufficiently important that the First Amendment value attached to billboards must yield. And I would be surprised if the Federal Government had much trouble making the argument that billboards could be entirely banned in Yellowstone National Park, where their very existence would so obviously be inconsistent with the surrounding landscape.

Metromedia, 453 U.S. at 533-34, 101 S.Ct. at 2906 (Brennan, J., concurring).

Next, we must also decide whether this ordinance is sufficiently narrowly drawn, and leaves open ample channels of communication of noncommercial messages. Again, we find that it is and does. The ordinance does not apply to the entire city of Douglasville. Off-premise noncom-

mercial signs are allowed in the parts of the city not designated as a historic district. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53-54, 106 SCt. 925, 932, 89 L.Ed.2d 29 (1986) (it was not an unreasonable restriction to have five percent of the entire city's area zoned available for adult movie theatres as the First Amendment does not guarantee freedom from marketplace competition over commercial sites).

Because a blanket ban on off-premise signs is limited to the historic district of Douglasville, we do not need to decide if a government's interests in traffic safety and aesthetics are an acceptable justification for a city-wide ban of off-premise noncommercial signs. We simply decide that the government's interests in the aesthetics of a designated historic district are sufficiently significant to override the First Amendment rights of a property owner to off-premise noncommercial signs.

2. Other restrictions on off-premise signs

Messer also attacks various other limitations on off-premise signs as also favoring commercial over noncommercial speech. *See* note 3, *supra*. Because we find that limitations on off-premise signs are viewpoint neutral, we find the ordinances to be valid time, place and manner regulations. There is absolutely no evidence in the record to show that these ordinances unduly impact noncommercial speech, as Messer argues, or were designed to suppress such noncommercial speech.

B. *The exemptions from the permit requirements*

Section 26-17 of the Douglasville sign code exempts five types of signs from permitting requirements and/or permit fees: 1) one wall sign per building side announcing the business and attached to the side of the building, 2) one real estate "for sale" sign per property frontage, 3) one bulletin board located on religious, public, charitable or educational premises, 4) one construction identifi-

cation sign, and 5) directional traffic signs containing no advertisements.[4] Like the remainder of the ordinances discussed *infra*, this ordinance applies city wide.

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[4] ARTICLE II. PERMITS

Section 26-16. Permit required.

No sign shall be erected reconstructed, expanded or replaced without securing a permit from the building official. All nonconforming signs shall be registered with the building official within ninety (90) days of the effective date of this chapter. No permit shall be required for a change of copy on a sign, the customary use of which involves frequent and periodic changes of copy.

Sec. 26-17. Permit fee not required.

No permit fee shall be charged for the following types of signs, however, prints or drawings showing location of such signs shall be submitted to the building official. No additional wall signs, real estate sales signs, bulletin boards, or project signs except as authorized under this section shall be permitted.

(1) A permit must be obtained, but no permit fee shall be charged for one wall sign per building side announcing the business and attached flat to the side of the building. The wall sign(s) shall cover no more than a miximum of twenty-five percent (25%) of the wall surface.

(2) No permit or permit fee shall be required for one real estate "for sale" sign per property frontage that does not exceed twelve (12) square feet in sign area in residential areas or one hundred (100) square feet in sign area in nonresidential districts. No separate "for lease" sign may be displayed except within the sign face of an existing permitted sign or within the window of the building "for lease."

(3) No permit or permit fee shall be required for one bulletin board that does not exceed thirty-two (32) square feet in sign area for public, charitable, educational or religious institutions when the sign is located on the premises of said institution.

(4) No permit or permit fee shall be required for one (1) sign per project location denoting the architect, engineer, contractor or financial institution when placed upon work under construction, alteration or removal that does not exceed fifteen (15) square feet in sign area in residential areas or one hundred (100) square feet in sign area in nonresidential districts.

[Continued]

Messer argues that the ordinance distinguishes between different noncommercial messages, and exempts certain noncommercial messages from permitting requirements based on their content, resulting in an unconstitutional content-based restriction on the noncommercial messages not so exempted. He argues that as the San Diego ordinance in *Metromedia* was struck for its system of exemptions favoring certain types of noncommercial speech over others, so should the Douglasville ordinance be struck.

The *Metromedia* plurality struck the San Diego ordinance because it had a system of exceptions to the general ban on non-commercial billboards which violated the First Amendment.[5] The court held that "[w]ith respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse. . . . Because some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones. San Diego must similarly allow billboards conveying other noncommercial messages throughout those zones." *Metromedia*, 453 U.S. at 515, 101 S.Ct. at 2896.

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[4] [Continued]

All such signs shall be removed within seven (7) days after substantial completion of the project.

(5) No permit shall be required for signs directing traffic movement onto a premise or within a premise if the direct or sign is under thirty (30) inches high and contains no advertisement.

[5] The noncommercial signs excepted from the general ban were:

A fixed sign may be used to identify any piece of property and its owner. Any piece of property may carry or dispiay religious symbols, commemorative plaques of recognized historical societies and organizations, signs carrying news items or telling the time or temperature, signs erected in discharge of any governmental function, or temporary political campaign signs. No other noncommercial or ideological signs meeting the the structural definition are permitted, regardless of their effect on traffic safety or esthetics.

Metromedia, 453 U.S. at 514, 101 S.Ct. at 2896.

Interpreting *Metromedia* to hold that "an ordinance is invalid if it . . . regulates non-commercial billboards based on their content," the Ninth Circuit struck an ordinance because of its system of exemptions from a city wide ban on off-site advertising billboards. *National Advertising Co. v. Orange*, 861 F.2d 246, 248 (9th Cir.1988).[6]

We find that the exemptions in the Douglasville ordinance are distinguishable from the exemptions in the San Diego and Orange ordinances. First, "[l]aws regulating the time, place or manner of speech stand on a different footing from laws prohibiting speech altogether." *Linmark Assocs. Inc. v. Willingboro*, 431 U.S. 85, 93, 97 S.Ct. 1614, 1618, 52 L.Ed.2d 155 (1977). Unlike the San Diego and City of Orange requirements, the Douglasville exemptions are not exemptions from a general ban of all off-premise billboards, but from permitting requirements and permits fees. Messer has not challenged the *permit process* as an unconstitutional restriction on speech. Thus, the Douglasville sign ordinance stands on a different footing from the complete bans on speech in San Diego and the City of Orange.

Second, these exemptions are much more limited than those in the San Diego or City or Orange ordinances, and do not favor commercial over noncommercial messages, neither do they express a preference between different noncommercial messages. There are no specific exemptions for political, historical, religious, or special event signs. In fact, this ordinance favors noncommercial over com-

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[6] Signs that did not require permits included governmental and utility signs, memorial tablets, some flags, nonelectric signs within recreational facilities which were not visible from any public street, temporary political signs, temporary nonelectric real estate and construction signs, small nonelectric signs within a building, small real estate pennants used for open house activity, small traffic signs and changes on copy signs. *Orange*, 861 F.2d at 248 n. 2.

The Ninth Circuit discussed, but reserved judgment on whether an onsite/offsite distinction between noncommercial messages would be valid. *Orange*, 861 F.2d at 249 n. 3.

mercial mesages by expressly *deregulating* messages by noncommercial speakers.

Thus, we hold that the system of exemptions from the permitting process do not violate the First Amendment.

C. *The temporary permit bond requirements*

Section 26-18 of the Douglasville Code authorizes "temporary permits for instructional and political signs to be placed on the streets of the city, . . . whereby the public will be directed to a specific place or event or a specific political candidate or political issue." The applicant for such a permit must post a $500 bond to ensure that the signs are removed within 10 days following the event the signs advertise.

Messer argues that this requirement burdens applicants to post political signs with a financial requirement not applicable to others, and thus is a limitation on the fundamental right of political speech. We find no truth in this assertion. The bond requirement burdens all signs regarding events of a temporary nature.

Messer also argues that the regulation is not sufficiently narrowly tailored to pass constitutional muster as other alternatives exist to ensure that temporary signs are removed. However, it is not necessary to pass the least restrictive regulation possible. "[T]he regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward v. Rock Against Racism*, 491 U.S. 781, 800, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989). Thus, even if there exists narrower means of achieving the government's purpose, as Messer suggests, because this regulation is not *substantially* broader than necessary, the regulation is upheld

D. *The portable display provisions*

Portable display signs are "mobile/temporary, electrical or nonelectrical, changeable copy sign[s] . . . mounted on a trailer type frame with or without wheels or skids or

portable wood or metal frame and not permanently attached to the ground." City of Douglasville, Ga.Code § 26-4. Section 26-8(D)(4) limits the maximum number of portable display signs that can be issued to a business to one temporary permit for every six months, the permit to last for a maximum of sixteen days.

In *Harnish v. Manatee County*, 783 F.2d 1535 (11th Cir.1986), this court held that aesthetics was a substantial government interest and a county's total ban on portable signs was constitutional.[7] In *Don's Porta Signs, Inc. v. Clearwater*, 829 F.2d 1051 (1th Cir.1987), *cert. denied*, 485 U.S. 981, 108 S.Ct. 1280, 99 L.E.2d 491 (1988), this court found that regulations limiting the size and use of portable signs were constitutional as they directly furthered the governmental interest in aesthetics by producing at least a *partial solution* to the government's efforts to reduce visual clutter.

The City of Douglasville has expressed an interest in aesthetics,[8] and has chosen a partial solution by limiting

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[7] The *Harnish* court reasoned that *Metromedia*, *Vincent* and *Clark supra*, stood for three principles:

> 1. Aesthetics is a substantial governmental goal which is entitled to and should be accorded weighty respect;
>
> 2. The governmental entity charged with the responsibility of protecting the environment must be given discretion in determining how much protection is necessary and the best method of achieving that portection; and
>
> 3. Although any regulation of speech is capable of being narrowed to some extent, the Constitution does not mandate speculation as to how restrictions could be redrafted as long as the restriction is narrowly tailored to achieve the aesthetic goal and alternative means of communication remain available.

Harnish, 783 F.2d at 1539 (footnote omitted).

[8] Section 26-1 of the Douglasville Code states:

> In order to protect the public safety, to assure compatibility of signs with surrounding land uses, to enhance the business and economy of the City of Douglasville, to protect the public investment in the streets and highways, to maintain the tranquil

the use of portable signs. Since it could have prohibited *all* portable signs in furtherance of this interest, by allowing a limited number, it is in fact more narrowly tailoring the restrictions to meet its purposes. Thus, the ordinance is constitutional.

We find *Dills v. City of Marietta*, 674 F.2d 1377 (11th Cir.1982), *cert. denied*, 461 U.S. 905, 103 S.Ct. 1873, 76 L.Ed.2d 806 (1983), inapposite to this case. In *Dills*, this court overturned a regulation on portable signs because the city had presented no evidence to support its argument that it had prohibited such signs in the interest of aesthetics. *Dills*, 674 F.2d at 1381.

E. *Messer's standing to challenge the variance powers of the Douglasville Board of Appeals and Adjustments*

Section 26-10(1) allows for the owner of a proposed sign or his duly authorized agent to appeal from a decision of the building official. Messer challenges the delegation of variance powers to the Board as unconstitutionally vague and broad in violation of due process. To grant a variance, there must be a showing that the application of the ordinance is contrary to the purpose of the code, and that it would result in manifest injustice.

We affirm the district court's holding that Messer does not have standing to challenge the Board of Appeals, as it was not he who had requested and received the hearing. The appeal in this case had been made by the billboard companies Holland and Jimbo, who have since been dismissed from this case with prejudice. Messer has made no

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environment of residential areas, to promote industy and commerce, to provide an aesthetically appealing environment, and to provide for the orderly and reasonable display of advertising for the benefit of all its citizens, the city council of Douglasville, Georgia, hereby determines that the public health, safety and welfare, and to eliminate visual clutter and blight, require the adoption of this chapter.

attempt at any showing that he requested and was denied a hearing, a variance, or that his individual due process rights were in any way violated. He has not attempted to exhaust his administrative remedies before appealing to this court. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S.Ct. 459, 463, 82 L.Ed. 638 (1938) ("no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted").

III. CONCLUSION

For the foregoing reasons, we AFFIRM the holding of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

1:90-cv-1521-RCF

JAMES G. MESSER, *et al.*

vs.

CITY OF DOUGLASVILLE, GEORGIA

ORDER

[Filed June 26, 1991]

This action is before the court on cross-motions for summary judgment.

Background

Plaintiff [1] owns a tract of real property in the City of Douglasville which is located in the Douglasville Historic District. Plaintiff previously leased a portion of this property to Jimbo Displays, Ins. for the sole purpose of allowing the erection and maintenance of an outdoor advertising structure [billboard]. The City of Douglasville originally authorized a permit for the billboard on plaintiff's property, but it later stated that the sign was in violation of the Sign Ordinance [ordinance] enacted on June 1, 1989. Thereafter Adams Outdoor Advertising of Atlanta, Inc. contracted with plaintiff to lease plain-

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[1] All plaintiffs other than James G. Messer have been dismissed from this action.

tiff's property for placement of a billboard. This lease is contingent upon plaintiff prevailing in this action.

Plaintiff challenges the constitutionality of defendant's ordinance on five grounds: 1) the ordinance violates the first amendment by favoring commercial speech over non-commercial speech; 2) the ordinance violates the first amendment because its permit process is not content-neutral; 3) the temporary permit provisions of the ordinance violate the first amendment and the equal protection clause of the fourteenth amendment; 4) the portable display provisions of the sign ordinance violate the first amendment; and 5) the variance powers granted to the Douglasville Board of Adjustments and Appeals in the ordinance violate the due proces clauses of the fourteenth amendments to the U.S. and Georgia Constitutions.

Summary Judgment Standard

Under Fed. R. Civ. P. 56 the court should grant a motion for summary judgment where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." The Supreme Court has clarified the standard for granting summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); *Anderson v Liberty Lobby, Inc*, 477 U.S. 242, 106 S. Ct. 2505 (1986). The movant carries his burden by showing the court that there is "an absence of evidence to support the nonmoving party's case" *Celotex*, 477 U.S. at 325, 106 S. Ct. at 2554. The nonmovant, however, bears the burden of sufficiently establishing the existence of each element essential to his case on which he will bear the burden of proof at trial. *Id.* at 322, 106 S. Ct. at 2553. "The mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512. The court, resolving all reasonable doubts in favor of the nonmovant, must determine "whether a fair-minded jury

could return a verdict for the plaintiff on the evidence presented." *Id.*

Discussion

Plaintiff contends that the ordinance favors commercial speech over noncomercial speech in several instances because of the manner in which it defines off-premise advertising signs and on-premise signs. Section 26-4 of the ordinance defines an off-premise advertising sign as "[a] sign which directs attention to a building, profession, product, service, activity, or entertainment not conducted, sold, or offered on the property upon which the sign is located." An on-premise sign is defined as "[a] sign which directs attention to a building, profession, product, service, activity, or entertainment conducted, sold, or offered on the property upon which the sign is located." Under the ordinance, only on-premise signs are permitted in the Douglasville Historic District. Plaintiff asserts that pursuant to these definitions, only an off-premise advertising sign may bear a noncommercial message, and "an on-premise sign will never bear a non-commercial message except in the rare instance in which the premises on which it is placed is the local office of a non-commercial enterprise." Plaintiff's Brief in Support, at 4.

Plaintiff relies upon the Supreme Court's decision in *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 101 S. Ct. 2882 (1981), to support his contention that the ordinance's distinction between commercial and non-commercial speech violates the first amendment. The San Diego ordinance at issue in *Metromedia* prohibited billboards conveying noncommercial messages throughout the city. The Court held that "the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial mesages." 453 U.S. at 513, 101 S. Ct. at 2895.

The court finds the ordinance at issue distinguishable from the ordinance in *Metromedia*. Defendant correctly asserts that "[t]he Douglasville ordinance permits any message, whether commercial or non-commercial, as long as it relates to the *activity* carried out on the premises" in the city's historic district. Defendant's Brief in Support, at 7. The ordinance in *Metromedia* clearly restricted the content of on-premises billboards to commercial speech.

Despite plaintiff's attempts to differentiate it, the court finds that the ordinance in this action is very similar to the ordinance upheld by the Sixth Circuit in *Wheeler v. Comm'r of Highways*, 822 F.2d 586, 593 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007, *reh'g denied*, 485 U.S. 944 (1988). The court in *Wheeler* distinguished *Metromedia* on the same basis, explaining

> [a]dditionally, unlike the ordinance in *Metromedia*, the . . . restrictions permit any non-commercial signs as long as they relate to an activity on the premises. The magistrate failed to recognize that messages such as "Abortion is Murder" or "No Nukes" are permissible as long as an activity is conducted on the property.

Id. The court therefore finds that the ordinance does not impermissibly distinguish between commercial and non-commercial speech in violation of the first amendment.

Defendant asserts that plaintiff does not have standing to challenge the permit process of the ordinance, the temporary permit provisions, or the portable display provisions of the ordinance. In fact, *defendant fails to address plaintiff's challenge to these provisions on the merits.* The court finds that, to the contrary, plaintiff does have standing to challenge these additional provisions of the Douglasville ordinance. As the Supreme Court has explained,

> in the First Amendment context, "litigants [] are permitted to challenge a statute not because their

> own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."

Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, ——, 108 S. Ct. 636, 642 (1988) (cit. omitted). After carefully considering plaintiff's briefs addressing these three arguments, the court is inclined to strike the ordinance at issue on at least one of the above grounds. However, in the interest of judicial economy, the court believes a supplemental brief by defendant addressing these issues will be helpful to the court's resolution of the cross-motions for summary judgment.

The court finds that defendant is correct in its assertion that plaintiff does not have standing to challenge the variance powers given to the Douglasville Board of Adjustments and Appeals on fourteenth amendment due process grounds. Defendant contends that "[t]he Plaintiff has no standing to complain of a procedural due process violation in a hearing before the board of zoning adjustments and appeals because he did not request a hearing." Defendants' Brief in Response, at 11. The Supreme Court has stated that in order to assert a constitutional challenge to a governmental action a plaintiff must demonstrate that he " 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical'." *Los Angeles v. Lyons*, 461 U.S. 95, 103, 103 S. Ct. 1660, 1665 (1983). It is undisputed that the only hearing that took place in relation to this action was requested by Mr. Holland, on behalf of Holland Outdoor Advertising and Jimbo Displays, Inc., two corporations who have been dismissed from this action with prejudice. Thus, plaintiff's due process challenge to this portion of the ordinance is clearly "conjectural."

Accordingly, defendant's motion for summary judgment is GRANTED IN PART. Defendant's motion for oral argument is DENIED. Defendant is DIRECTED to file a supplemental brief addressing the specific issues outlined above within twenty (20) days from the entry of this order. Plaintiff may file a reply to defendant's supplemental response within ten (10) days thereafter. The court DEFERS ruling on the remaining portions of the cross-motions for summary judgment. The Clerk is DIRECTED to resubmit this action upon expiration of the above time period.

SO ORDERED, this 26th day of June, 1991.

/s/ Richard C. Freeman
RICHARD C. FREEMAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

1:90-cv-1521-RCF

JAMES G. MESSER, *et al.*

vs.

CITY OF DOUGLASVILLE, GEORGIA

ORDER

[Filed September 25, 1991]

This action is before the court on cross-motions for summary judgment.

Background

Plaintiff [1] owns a tract of real property in the City of Douglasville which is located in the Douglasville Historic District. Plaintiff previously leased a portion of this property to Jimbo Displays, Inc. for the sole purpose of allowing the erection and maintenance of an outdoor advertising structure [billboard]. The City of Douglasville originally authorized a permit for the billboard on plaintiff's property, but it later stated that the billboard was in violation of the Sign Ordinance [ordinance] enacted on June 1, 1989. Thereafter Adams Outdoor Advertising of Atlanta, Inc. contracted with plaintiff to lease plain-

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[1] All plaintiffs other than James G. Messer have been dismissed from this action.

tiff's property for placement of a billboard. This lease is contingent upon plaintiff prevailing in this action.

Plaintiff challenges the constitutionality of the ordinance on five grounds: 1) the ordinance violates the first amendment by favoring commercial speech over noncommercial speech; 2) the ordinance violates the first amendment because its permit process is not content-neutral; 3) the temporary permit provisions of the ordinance violate the first amendment and the equal protection clause of the fourteenth amendment; 4) the portable display provisions of the sign ordinance violate the first amendment; and 5) the variance powers granted to the Douglasville Board of Adjustments and Appeals in the ordinance violate the due process clauses of the fourteenth amendments to the U.S. and Georgia Constitutions. In its order of June 26, 1991, the court granted summary judgment in favor of the defendant on plaintiff Messer's first and fifth grounds. The court also directed the parties to file supplemental briefs addressing the constitutionality of the ordinance's permit process, the temporary permit provisions, and the portable display provisions.

Summary Judgment Standard

Under Fed. R. Civ. P. 56 the court should grant a motion for summary judgment where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." The movant carries his burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986). The nonmovant, however, is then required "to go beyond the pleadings" and present competent evidence in the form of affidavits, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial" *Id.* at 334, 106 S. Ct. at 2553. Generally, "[t]he mere existence of a scintilla of evidence" supporting the nonmovant's case is

insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986). The court, resolving all reasonable doubts in favor of the nonmovant, must determine "whether a fairminded jury could return a verdict for the plaintiff on the evidence presented" *Id.*

Discussion

a. Section 26-17 of the Ordinance

The parties agree that this section of the ordinance should be analyzed by the court in accordance with the analysis used in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 100 S. Ct. 2343 (1980). The *Central Hudson* test is summarized as follows:

> (1) only commercial speech which concerns a lawful activity and is not misleading is protected under the first amendment. A restriction on protected commercial speech is valid if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Don's Porta Signs, Inc. v. Clearwater, 829 F.2d 1051, 1052 (11th Cir.), *cert. denied*, 485 U.S. 981 (1987). The parties agree that the first prong of the test is satisfied.

The constitutionality of section 26-16 of the ordinance was upheld in the court's order of June 26, 1991. Section 26-17 provides that certain signs are exempt from the permit requirement set out in section 26-16. After carefully reviewing the parties' briefs on this issue, the court finds no constitutional infirmity in section 26-17 of the ordinance. The list of exemptions in section 26-17 is clearly not a *restriction* on commercial speech.

b. Section 26-18 of the Ordinance

This section of the ordinance requires persons interested in advertising or calling attention to a specific event, political candidate, or political issue to obtain a temporary permit prior to posting a sign of that nature. The temporary permit for such signs will not be issued until the applicant files a bond by a licensed surety company or a cash bond in the amount of $500. The bond is refunded upon removal of the signs after the event.

Defendant contends that this section of the ordinance seeks to advance the city's aesthetic interest. The city asserts that this section directly advances that interest because "the only way to insure removal of the signs is to require a bond up front." Defendant's Supplemental Brief, at 15.

Plaintiff contends that this section of the ordinance is a limitation on the fundamental right of political speech and challenges it on both first and fourteenth amendment grounds. Plaintiff further claims that "it is clear that less intrusive means exist to require the removal of political and special events signs after the occurrence of an election or a special event. One obvious method would be to require the placement on each sign of the name and street address of an individual or officer of the party posting the sign under penalty of immediate removal by the city for failure to do so." Plaintiff's Reply to Defendant's Supplemental Brief, at 7. Plaintiff contends "that the [c]ourt must not only assess the substantiality of the governmental interests asserted but also determine whether those interests could be served by means that would be less intrusive on activity protected by the [f]irst [a]mendment." *Schad v. Mt. Ephraim*, 452 U.S. 61, 70, 101 S. Ct. 2176, 2183 (1981).

The court again finds no constitutional infirmity in this section of the ordinance. Plaintiff's argument as to this section rests primarily upon the claim that there are

clearly less intrusive means of assuring removal of political and special events signs after the occurence of an event. After carefully considering the parties' contentions, the court finds that this section is narrowly tailored to support a substantial governmental interest. It is clear that in first amendment analysis, "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward v. Rock Against Racism*, 491 U.S. 781, ——, 109 S. Ct. 2746, 2758 (1989). Furthermore, "[i]f there is a sufficient 'fit' between the legislature's means and ends to satisfy the concerns of the [f]irst [a]mendment, the same 'fit' is surely adequate under the applicable 'rational basis' equal protection analysis." *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, ——, 106 S. Ct. 2968, 2978 n. 9 (1986).

c. Section 26-8(D)(4) of the Ordinance

Plaintiff finally challenges this section of the ordinance which "provides that the maximum number of portable display temporary sign permits that may be issued to a business on an individual lot is limited to one temporary permit during every six-month period and also requires the temporary permit [to] be issued for a period of time not to exceed sixteen calendar days." Plaintiff's Reply to Defendant's Supplemental Brief, at 9. Plaintiff relies solely upon the Eleventh Circuit's holding in *Dills v. Marietta*, 674 F.2d 1377 (11th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983).

The court finds that based upon two more recent Eleventh Circuit opinions applying the *Central Hudson* test to this type of ordinance, this section regulating portable displays is clearly constitutional. In both *Don's Porta Signs, Inc. v. Clearwater*, 829 F.2d at 1053, and

Harnish v. Manatee County, 783 F.2d 1535, 1539 (11th Cir. 1986), the defendants' asserted interest in regulating portable signs was also "aesthetic." In upholding the regulation at issue in *Don's Porta Signs*, the court explained that "the governmental entity charged with the responsibility of making determinations about aesthetics must be given discretion in determining both the best method of achieving that goal and the degree of protection necessary." 829 F.2d at 1053. Section 26-8(D)(4) of the ordinance similarly meets the requirements of the *Central Hudson* test.

The court finds *Dills* distinguishable, because the ordinance at issue in that case included only a broad statement of purpose, and there was "an absence of any evidence that Marietta officials considered portable signs aesthetically displeasing." 674 F.2d at 1381. The court therefore determined that the real interests of the city of Marietta was in traffic safety, and the court found that the "time restrictions imposed on the use of portable signs do not directly advance the claimed interest in traffic safety." *Id.*

CONCLUSION

Accordingly, defendants' motion for summary judgment is GRANTED. The Clerk is DIRECTED to enter final judgment in this action in favor of defendant.

SO ORDERED, this 25th day of September, 1991.

/s/ Richard C. Freeman
RICHARD C. FREEMAN
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8941

JAMES G. MESSER,
Plaintiff-Appellant,

versus

CITY OF DOUGLASVILLE, GEORGIA,
a political subdivision of the State of Georgia,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

[Filed December 28, 1992]

Before: DUBINA, Circuit Judge, HILL and CLARK, Senior Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
United States Circuit Judge

DOUGLASVILLE, GEORGIA
SIGN CONTROL ORDINANCE

ARTICLE I. IN GENERAL

Sec. 26-1. Preamble.

In order to protect the public safety, to assure compatibility of signs with surrounding land uses, to enhance the business and economy of the City Douglasville, to protect the public investment in the streets and highways, to maintain the tranquil environment of residential areas, to promote industry and commerce, to provide an aesthetically appealing environment, and to provide for the orderly and reasonable display of advertising for the benefit of all its citizens, the city council of Douglasville, Georgia, hereby determines that the public health, safety and welfare, and to eliminate visual clutter and blight, require the adoption of this chapter.

* * * *

Sec. 26-4. Definitions.

For the purpose of this section, certain terms and words are hereby defined. Words in the present tense shall include the future, the singular number shall include the plural and the plural shall include the singular, and the word shall is mandatory.

Animated sign: A sign with action or motion, with moving characters, or changing colors which require electricity, but not including wind activated elements, such as flags or banners. This definition does not include time and temperature signs.

Announcement sign: A single face non-illuminated professional or incidental sign not exceeding two (2) square feet in area, and attached wholly to a building, window or door. Such sign only includes emergency information, business hours, credit card honored and other accessory information.

Area of sign: The area within a continuous perimeter enclosing the limits of writing, representation, emblem or any figure or character, together with any frame or other material of color forming an internal part of the display or used to differentiate such sign from the background against which it is placed; excluding the necessary supports or uprights on which such sign is placed; provided, however, any open space contained within the outer limits of the display face of a sign or between any component, panel or strip, or figure of any kind composing the display face shall be included in the computation of the area of the sign, whether or not such open space be enclosed by a frame or border. For projecting or double-faced signs, only one display face shall be measured in computing sign area where the sign faces are parallel or where the interior angle formed by the faces is sixty (60) degrees or less. If the two (2) faces of a double-faced sign are of unequal area, the area of the sign shall be taken as the area of the larger face.

Building identification sign: A facia sign used to identify or indicate the name of a building.

Bulletin board: A sign which primarily displays the name of a noncommercial place of public assembly and announces the upcoming event(s) of that organization.

Business sign: Same as on-premise sign.

Canopy sign: A sign either temporarily or permanently affixed to, superimposed upon, or painted on any roof-like structure, which is extended over a sidewalk or vehicle access area. A flush canopy sign is one that is mounted in such a manner that a continuous plane with the canopy is formed. A hanging canopy sign is one suspended from or beneath the canopy.

Facia sign: A single face sign which is in any manner attached, or fixed flat to an exterior wall of a building or structure; included in this defintion shall be individual letters and "box type" (i.e. letters and symbols on an attached backing).

Flashing sign: A sign, the illumination of which is not kept constant in intensity at all times when in use, and which exhibits sudden or marked changes in lighting effect. Illuminated signs which indicate the time, temperature, or date shall not be considered a flashing sign.

Freestanding sign: A sign which is supported by one or more columns, uprights, or braces in or upon the ground and is not attached to a building and is not mobile or temporary.

Heights: The distance from the ground to the top of the sign as measured between the furthermost points.

Illuminated sign: A sign designed to give forth artificial light directly or through transparent or translucent material from a source of light within such sign, including but not limited to, neon and exposed lamp signs.

Indirectly illuminated sign: A sign illuminated by an exterior light directed primarily toward such sign and so shielded that no direct rays from the light are visible elsewhere than on the lot where said illumination occurs. If not effectively shielded, such sign shall be deemed to be an illuminated sign.

Marquee: A roofed structure attached to and supported by a building and projecting over public or private sidewalks or rights-of-way.

Marquee sign: A sign painted on, attached to, or hung from a marquee.

Off-premise advertising sign: A sign which directs attention to a building, profession, product, service, activity, or entertainment not conducted, sold, or offered on the property upon which the sign is located.

On-premise sign: A sign which directs attention to a building, profesion, product, service, activity, or entertainment conducted, sold, or offered on the property upon which the sign is located.

Planned commercial center: Three (3) or more commercial establishments which are planned, developed, and managed as a unit and which provide free parking facilities on one lot or contiguous lots.

Portable display sign: A mobile/temporary, electrical or non-electrical, changeable copy sign that is mounted on a trailer type frame with or without wheels or skids or portable wood or metal frame and not permanently attached to the ground.

Projecting sign: A sign which is attached to the building wall and which extends more than eighteen (18) inches from the face of such wall.

Public service sign: Any sign erected and maintained by public officials, or public agencies, or approved and authorized for use by state or local governmental authorities.

Roof sign: A sign that is mounted on the roof of a building or which is wholly dependent upon a building for support and projects above the point of the building if the building has a flat roof, the eave line of a building with a gambrel, gable or hip roof, or the deck line of a building with a mansard roof.

Rotating sign: A sign which is designed to revolve by means of electrical power.

Sign: Any name, identification, description, display, illustration, or device which is affixed to or represented directly or indirectly upon the exterior of a building, structure, or land in view of the general public which directs attention to a product, place, activity, person, business or institution.

Wall sign: A sign which is in any manner affixed to any exterior wall of a building or structure and which projects not more than eighteen (18) inches from the building or structure wall.

Sec. 26-7. Prohibited signs.

The following types of signs shall be prohibited unless authorized by a temporary permit:

* * * *

(9) No off-premise sign shall be located within three hundred (300) feet of any officially designated historical site or monument, except signs pertaining to that particular site.

* * * *

Sec. 26-8. Special regulation by type of sign.

* * * *

(b) *Freestanding on-premise signs:*

* * * *

(6) Height requirements. The height of all on-premise freestanding signs at their highest point above the level of the ground shall not exceed fifty (50) feet; provided, however, that a sign located on property adjacent to or within five hundred (500) feet of a Federal Interstate Highway which advertises a product or service of specific interest to the motoring public, such as automobile service stations, restaurants and motels, may be seventy (70) feet at its highest point, however if the ground is lower than the level of the adjoining street pavement, then a sign may be raised so as to be no more than twenty-five (25) feet above the level of the pavement. The level of the ground shall not be altered in such a way as to provide additional sign height. The height of all wall, canopy, and roof signs at their highest point above ground level shall be as provided by the standards of the applicable zoning district.

* * * *

(c) *Off-premise signs in general:*

* * * *

(3) *Height above interstate grade.* All signs adjacent to the interstate right-of-way shall be a minimum of ten (10) feet above the adjacent interstate pavement measuring from the lower portion of the sign face. Signs shall not exceed thirty (30) feet in height. Two (2) signs in the same location (back to back) or in a "V" formation shall be the same height above the interstate surface.

* * * *

(5) *Number of signs per location.* Only one sign on-premise or off-premise shall be allowed per lot frontage where a business, profession, product, service, activity, or entertainment is conducted, sold, or offered. Where no business, profession, product, service, activity, or entertainment is conducted, sold, or offered signs shall be no less than one thousand (1,000) feet apart measuring from the two (2) closest points and only one sign face shall be allowed to face the same direction per location. This allows back to back or "v" formation signs but prohibits two (2) signs (side by side or over and under) facing the same direction.

(6) *Spacing on the interstate.* Sign locations on property adjacent to the interstate highway right-of-way shall be no less than one thousand (1,000) feet apart, measuring from the two (2) closest points.

* * * *

(9) *Marsh area prohibitions.* No sign shall be placed in or obstruct the view of marshland.

(10) Signs shall not be placed within two hundred (200) feet of the property line of a bona fide residence, church, school, park or public building, as measured by the two (2) closest points.

* * * *

ARTICLE II. PERMITS

Sec. 26-16. Permit required.

(a) No sign shall be erected, reconstructed, expanded or replaced without securing a permit from the building official. All nonconforming signs shall be registered with the building official within ninety (90) days of the effective date of this chapter. No permit shall be required for a change of copy on a sign, the customary use of which involves frequent and periodic changes of copy.

Sec. 26-17. Permit fee not required.

No permit fee shall be charged for the following types of signs, however, prints or drawings showing location of such signs shall be submitted to the building official. No additional wall signs, real estate sales signs, bulletin boards, or project signs except as authorized under this section shall be permitted.

(a) A permit must be obtained, but no permit fee shall be charged for one wall sign per building side announcing the business and attached flat to the side of the building. The wall sign(s) shall cover no more than a maximum of twenty-five percent (25%) of the wall surface.

(b) No permit or permit fee shall be required for one real estate "for sale" sign per property frontage, that does not exceed twelve (12) square feet in sign area in residential areas or one hundred (100) square feet in sign area in nonresidential districts. No separate "for lease" sign may be displayed except within the sign face of an existing permitted sign or within the window of the building "for lease."

(c) No permit or permit fee shall be required for one bulletin board that does not exceed thirty-two (32) square feet in sign area for public, charitable,

educational or religious institutions when the sign is located on the premises of said institution.

(d) No permit or permit fee shall be required for one sign per project location denoting the architect, engineer, contractor or financial institution when placed upon work under construction, alteration or removal that does not exceed fifteen (15) square feet in sign area in residential areas or one hundred (100) square feet in sign area in nonresidential districts. All such signs shall be removed from the site within seven (7) days after substantial completion of the project.

(e) No permit shall be required for signs directing traffic movement onto a premise or within a premise if the directional sign is under thirty (30) inches high and contains no advertisement.

ARTICLE III. HISTORIC DISTRICT

Sec. 26-26. Douglasville Historic District identified.

The Douglasville Historic District is identified and designated as that area within the City of Douglasville shown and identified on that certain map of the Douglasville Historic District, as now or hereafter amended by resolution of the city council of Douglasville. A copy of said map is on file for inspection in the office of the building official and is hereby incorporated herein by reference. (Ord. No. 89-18, 1, 4-17-89)

Sec. 26-27. Restrictions.

All signs in the Douglasville Historic District, with the exception of nonconforming signs as provided for in section 26-9(a), must be permitted by the building official, but only after such application for such sign has been reviewed by the downtown historic district review committee and a recommendation on such application has been to the building official. The following more restric-

tive provisions shall apply to the Douglasville Historic District in addition to other provisions of this chapter:

(1) *Temporary informational signs.* Temporary informational signs shall be permitted as follows:

(a) Exterior temporary informational signs shall provide information of sale, rent, lease or special promotions and shall be located on private property and shall be less than twenty-five (25) percent of the area of the principal use sign.

(b) No temporary informational sign shall be erected for a period exceeding sixty (60) days. After sixty (60) days, a certificate of approval is required from the building official.

(c) All temporary informational signs shall have the date that they first displayed written in the lower right hand corner; if said sign fails to have the first display date written in the lower right hand corner then it will be presumed that the sign has been displayed for the maximum sixty day period.

(2) *Announcement signs.* Announcement signs shall be permitted as follows:

(a) One announcement sign shall be permitted for the building entrance or exit provided it is restricted to providing only emergency information, business hours, credit cards honored, or other such incidental business related information.

(b) Announcement signs shall not exceed one square foot of display area.

(3) *Principal use and supplemental identification signs.* Principal use and supplemental identification signs shall be allowed as follows:

(a) Number of principal use and supplemental use signs per establishment allowed: One prin-

cipal use sign shall be permitted for each building establishment. The sign can be either a facia sign or a projection sign. Where a business fronts on more than one street or pedestrian walkway providing public access, one principal use sign for each such frontage shall be permitted; provided that only the maximum sign area computed for a given street frontage shall face that street. If the linear frontage per public street exceeds two hundred (200) feet, one additional sign shall be permitted for each additional one hundred (100) feet of street frontage or a fraction thereof.

(b) In addition to the principal use sign, supplemental identification signs, not exceeding an aggregate sign area of three (3) square feet, shall be permitted adjacent to each entrance of the building. Such identification signs shall be limited to providing the trade name or logo of the establishment, and shall be mounted or attached flat against the building.

(c) Principal use signs shall be restricted by the type as follows:

1. Projecting signs. Projecting signs shall be limited as follows:

   a. Projecting signs shall not exceed one sq. foot of display area per sign face per linear foot of frontage occupied by each principal use; provided that a maximum sign area of forty-five (45) square feet shall be permitted per sign face for each projecting principal use sign allowed.

   b. The outer edge of a projecting sign shall not extend more than five (5) feet from the building to which it is attached.

   c. The height of a projecting sign shall not extend above the parapet wall of the building,

the lowest point shall not be less than ten (10) feet above the established grade.

2. Facia signs. Facia signs shall be limited as follows:

   a. Facia signs shall not exceed one seventh (1/7) of the square footage of each principal building front.

   b. The facia sign shall not extend above the parapet wall of the buildings or extend within three (3) feet of the property line or common building line nor shall it project out from the building facade more than fifteen (15) inches.

3. Awning or canopy signs. In addition to other signs, one awning or canopy sign attached to the underside of the canopy or awning shall be permitted for each principal entrance providing access. The display area of such sign shall not exceed six (6) square feet per sign. Signs shall not be less than one foot from the outer edge of the canopy.

4. Marquee signs. A motion picture theater marquee sign may be extended to the leading edge of a marquee existing on the adoption date of this article, however, the total sign area of such sign shall not exceed a total of ninety (90) square feet. No additional permit shall be required where a sign is affixed to or part of such marquee in accordance with this article until such marquee is replaced, remodeled, or altered. New or remodeled signs shall not extend farther than eight (8) feet from the facade of a building nor exceed a sign area of greater than forty-five (45) square feet. The height of a new or re-modeled marquee sign shall not extend above the parapet wall of the building, and the lowest point of the

marquee sign shall not be less than ten (10) feet above the established grade.

5. Building identification sign. Building identification signs shall be permitted along the signable area of each building facade. The maximum aggregate size of such signs shall not exceed an area of one-half (1/2) square foot per linear foot of building frontage; provided, however, that the aggregate size of such signs along a single facade shall not exceed an area of ninety (90) square feet. (Ord. No. 89-18, § 1, 4-17-89)

Sec. 26-28. Prohibited signs.

The following signs are prohibited within the Douglasville Historic District unless specifically permitted as a temporary sign:

(1) Banners, pennants and streamers along or across road rights-of-way, except flags or banners of the United States or other political subdivision thereof.

(2) Folding signs, portable display signs, and similar movable signs.

(3) Signs erected on or located on any street or public post, trees, barricade, temporary walk, public system except public directory and information signs.

(4) Signs painted directly on the exterior walls of a building or structure not including graphic designs.

(5) Signs with revolving or rotating beams of light.

(6) Room mounted signs.

(7) Off-premise or separate use signs.

(8) Signs placed upon a structure in any manner so as to disfigure or conceal any window opening, door or significant architectural feature or detail of any building. (Ord. No. 89-18, § 1, 4-17-89)

Supreme Court, U.S.
FILED
APR 26 1993
OFFICE OF THE CLERK

No. 92-1553

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

JAMES G. MESSER,

Petitioner,

v.

CITY OF DOUGLASVILLE, GEORGIA,

Respondent.

Petition For Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Plaintiff/Petitioner James G. Messer ("Messer") is the owner of property located at 6508 Broad Street in the City of Douglasville, Georgia. In 1988, Jimbo Displays, Inc. leased a portion of the property from the Petitioner to construct a billboard on the premises.

On December 6, 1988, the Defendant/ Respondent, City of Douglasville, Georgia (the "city") issued a sign permit to the applicant, Jimbo Displays, Inc., for an off-premise sign, commonly referred to as a billboard, located at 6508 East Broad Street in the City of Douglasville. This permit was issued to Jimbo for the construction of the billboard at a specific location on the Broad Street property. Jimbo and Holland erected the sign thirty feet away from the site initially approved by Respondent. This new placement of the sign was done without consulting the city, and without filing an application for an additional sign permit. Placing the sign in a

location other than that for which the permit was approved was in violation of the permit and the ordinance.

The expiration date for construction of the sign was August 13, 1989, in accordance with the permit. No sign was ever constructed on the location for which the permit was issued, and in accordance with the expiration date, the sign permit expired on August 13, 1989. Contrary to Petitioner's Statement of Facts, the city did not revoke the sign permit. Petitioner let it expire when he failed to construct a sign at the authorized location.

The property where the sign was located is in the Douglasville, Georgia historic district. On April 17, 1989, the city enacted a new sign ordinance and pursuant to Section 2628(7), off-premise signs are not permitted in the Douglasville, Georgia historic district. Again, contrary to Petitioner's Statement of Facts, the record does not

establish that the Historic District includes most of the business district.

Subsequent to enacting the new sign ordinance provisions, the Respondent became aware of the existence of the Petitioner's unpermitted sign. The city advised Jimbo and Holland that the sign was not permitted, and due to the newly enacted ordinance provisions, the sign could not be constructed at the new location. Additionally, Jimbo was advised by the Department of Transportation for the State of Georgia that since the sign was located at a site other than the one originally requested, a state permit would have to be cancelled and reissued.

Jimbo and Holland, as the owners of the sign, received a hearing before the Board of Adjustments and Appeals requesting a reversal of the city's decision that the new sign was not permitted. After the hearing, the Board of Adjustments and Appeals upheld the decision of the building official. Jimbo and Holland

were advised of this decision on April 6, 1990.

Two months later with full knowledge of the city's decision, on July 10, 1990, Adams Outdoor Advertising, Inc. (Adams) entered into a lease with the Petitioner. The lease provided that the Petitioner is to receive lease payments for allowing Adams to maintain a sign structure on his premises. The lease is contingent on the Petitioner prevailing in this civil action. The Petitioner wants to recover damages for this lease.

On July 12, 1990, Messer, Holland Outdoor Displays, Inc., Jimbo Displays, Inc., and Adams Outdoor Advertising of Atlanta, Inc. filed the present civil action. All of the Plaintiffs except Petitioner subsequently reached an agreement with the city and dismissed their claims with prejudice.

Respondent concurs with Petitioner's recitation of the History of Proceedings.

RESPONSE TO REASONS FOR GRANTING THE WRIT

I. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE ELEVENTH CIRCUIT IS IN ACCORD WITH THIS COURT AND OTHER CIRCUITS IN CONCLUDING THAT THE DOUGLASVILLE SIGN ORDINANCE PROVISION THAT DISTINGUISHES ON-PREMISE SIGNS AND OFF-PREMISE SIGNS DOES NOT IMPERMISSIBLY DISTINGUISH BETWEEN COMMERCIAL AND NONCOMMERCIAL SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

As part of its local ordinances, the City of Douglasville, Georgia has established an historic district. Within this district all off-premise advertising signs, commonly referred to as billboards, are prohibited, regardless of their content. On-premise advertising signs are permitted within the district, regardless of their content. In enacting the ordinance, the city has acted only to assert its legitimate government interest in reasonably regulating the non-communicative aspects of advertising signs.

Although written and oral communication is protected by the First Amendment, the guarantee does not extend the right to

communicate at all times and places, and in any manner. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501-503, 101 S. Ct. 2882 (1981). Although billboards are a form of communication, their large size, stationary and permanent nature, and the fact that they stand out from their surroundings, create problems for land use planning and development. Id., at 503. "As with other media, the government has legitimate interests in controlling the noncommunicative aspects of the medium...." Id.

The Petitioner relies on Metromedia, supra. for authority to support his contention that the Douglasville ordinance violates the his First Amendment rights. While Metromedia establishes the rules of law, that case is very different from this one in that the ordinance in Metromedia regulated the content of messages and favored commercial speech while the Douglasville ordinance does not.

Regulation or restriction of speech is

permitted provided: 1) it is justified without reference to the content of the speech, 2) it is narrowly tailored to serve a substantial governmental interest, and 3) it leaves open, ample alternative channels for communication of information. Id. at 516. Respondent will address the first requirement because that is the only item challenged by the Petitioner. Petitioner concedes that regulating off-premise signs is narrowly tailored to serve a substantial governmental interest, and that the Douglasville ordinance leaves open ample alternative channels for communication of information. He contends only that the ordinance is not content neutral.

Douglasville's sign ordinance does not violate the First Amendment because the distinction between on-premise signs and off-premise signs is content neutral. The ordinance in this case, Section 26-28(7) of the Sign Control Zoning and Subdivision Regulations for the City of Douglasville,

Georgia prohibits off-premise signs within that portion of the city designated as the historic district; however, on-premise signs are permitted. Thus the ordinance only prohibits a particular type of sign, off-premise signs, within a certain section of the city.

Section 26-4 of the ordinance defines an off-premise advertising sign as: "A sign which directs attention to a building, profession, product, service, activity, or entertainment not conducted, sold, or offered on the property upon which the sign is located." An on-premise sign is defined as: "A sign which directs attention to a building, profession, product, service, activity, or entertainment conducted, sold, or offered on the property upon which the sign is located."

These definitions contain the same language, except that an off-premise sign directs attention to that which is not located on the property where the sign is, while the

on-premise sign directs attention to that which is located on the property. More importantly, neither definition restricts the message that may be placed on the sign. The ordinance simply provides at Section 26-8(7) that an off-premise sign is not permitted in an historic district and an on-premise sign is.

The Petitioner contends that the distinction between off-premise and on-premise advertising signs favors commercial speech over non-commercial speech because off-premise signs allow both commercial and non-commercial speech while on-premise signs permit only commercial speech. Such an interpretation is simply incorrect. In support of his interpretation, the Petitioner relies on the case of Metromedia, Inc. v. City of San Diego, supra. In Metromedia, at 493 (fn. 1), San Diego banned all off-premise outdoor advertising signs within the city limits. The ordinance provided an exception for on-premise

signs and for certain signs falling within twelve specific categories. Id., at 494. The ordinance in Metromedia, at 494, narrowly defined an on-premise sign as referring to the name of the owner or occupant of the premises, or identifying the premises, "or signs advertising goods manufactured or products or services rendered on the premises upon which such signs are placed."

The Court, in a plurality decision, held that the ordinance provision violated the Appellant's First Amendment right because commercial speech was given favorable treatment over non-commercial speech. Id., at 514. The Court reasoned that an off-premise billboard permitted either commercial or non-commercial speech, while an on-premise sign, limited the content to commercial speech. Id. As a result, on-premise signs carrying only commercial messages were permitted, while off-premise signs carrying either commercial or non-commercial messages were banned. Id., at

514-516.

The ordinance in Metromedia, supra, is very different from Douglasville's. The San Diego ordinance limited the definition of on-premise signs to those referring to the owner of the premises or the product or service provided on the premises, thereby restricting the content to a commercial message. Unlike Metromedia, Douglasville does not restrict the on-premise sign to the product or service. The Douglasville ordinance permits any message, whether commercial or non-commercial, as long as it relates to the activity carried out on the premises.

For this reason, the Eleventh Circuit correctly concluded in the present case that Metromedia, did not directly address the distinction between on-premise and off-premise signs when, as in this case, both types of signs permit commercial and non-commercial messages.

Recognizing that the local ordinance in

Metromedia, is distinguished from the present case, the Eleventh Circuit used the rules of law outlined in Metromedia, but not the result. The Eleventh Circuit correctly began its analysis of Douglasville's on-premise and off-premise signs by examining the language to determine whether the regulation is content neutral: "We must first decide whether such an ordinance seeks to regulate speech according to its content." Id.

The Court in the present case concluded that the Douglasville ordinance was content neutral because the regulation is based on the location of signs rather than the content:

> We find that the City of Douglasville's sign ordinance prohibiting off-premise billboards is similarly viewpoint neutral. It regulates signs not based on the viewpoint of the speaker, but based on the location of the signs. There is no claim of bias, censorship or preference regarding a speaker's point of view. The ordinance does not favor commercial over non-commercial speech; neither does it favor non-commercial over commercial speech. Contrary to Messer's argument, there is simply no basis for equating on-premise signs with commercial speech, and off-premise signs with

> noncommercial speech. A noncommercial enterprise would be able to put up a sign bearing a noncommercial message as long as it relates to any activity on the premises. Similarly, a commercial enterprise would be able to put up a sign bearing a noncommercial message which related to any activity on the premises.

Id.

In support of its holding, the Court relied on Wheeler v. Commissioner of Highways of Kentucky, 822 F.2d 586, cert. den'd 484 U.S. 1007, rehearing den'd, 485 U.S. 944 (6th Cir. 1987), because the ordinance was nearly the same as Douglasville's. In Wheeler, at 587, Kentucky enacted a law prohibiting the erection of all advertising signs located within a certain distance of an interstate or primary highway. The law exempted signs "advertising activities conducted on the property upon which they are located. ..." Wheeler, at 587 (fn. 1)(emphasis added).

The Wheeler Court in distinguishing the Metromedia case reasoned: "Unlike the restriction at issue in Metromedia, the on-

premises exception in the present case is not limited to commercial speech: the on-premise exception can be applied to any topic, commercial or non-commercial." Wheeler, at 593. The Court concluded "[T]he restrictions permit any non-commercial signs as long as they relate to an activity on the premises." Id.

In upholding the Kentucky statute, the Wheeler Court ruled:

> In the present case, the billboard act and regulations permit on-premises signs relating to an activity conducted on the site which the sign is located. Messages such as 'Abortion is Murder', 'Save the Whales', or 'George Wallace for President' are permitted in non-urban areas and areas not zoned industrial or commercial before September 21, 1959 as long as an activity relating to the message is being conducted on the premises. Non-commercial and commercial speech are treated alike.

Id., at 594. See Also, Rzadkowolski v. City of Lake Orion, 845 F. 2d 653 (6th Cir. 1988); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F. 2d 172 (4th Cir. 1988); Major Media of the Southeast, Inc., v. City of

Raleigh, 792 F.2d 1269, cert. den'd, 479 U.S. 1102 (4th Cir. 1986); National Advertising Co. v. Chicago, 788 F. Supp. 994 (N.D. Ill. 1991).

In was not lost on the Eleventh Circuit or the Sixth Circuit that the governing authority is not regulating a message. Instead, the ordinance has been carefully drafted to regulate the placement of signs while at the same time recognizing the right of the owner to call attention to the activities on his own property:

> [T]he on-premises/off-premises distinction does not constitute an impermissible regulation of content just because the determination of whether a sign is permitted at a given location is a function of the sign's message. Kentucky, by allowing persons who own or lease property, to have a sign, subject to size and space restrictions, advertising an activity conducted on the property is not favoring one message over another. The state has simply recognized that the right to advertise an activity conducted on-site is inherent in the ownership or lease of the property.

Messer v. City of Douglasville, Georgia, 975 F.2d 1505 (11th Cir. 1992) at 1510 (quoting Wheeler, at 591) (emphasis supplied).

Because Douglasville's ordinance is content neutral, the Eleventh Circuit decision in this case is consistent with the law in affirming the trial court's grant of summary judgment in favor of Respondent.

II. RESPONDENT'S ORDINANCE WHICH PERMITS CERTAIN TYPES OF SIGNS WITHOUT A PERMIT FEE DOES NOT VIOLATE THE FIRST AMENDMENT AS IT DOES NOT FAVOR COMMERCIAL MESSAGES OVER NONCOMMERCIAL MESSAGES, AND IT DOES NOT PROHIBIT ANY MESSAGE.

The purpose of Section 26-17 is to exempt certain types of signs from the requirements either of obtaining a permit or from paying a permit fee. This section of the ordinance does not add any restrictions, and it does not limit, alter, or distinguish these signs.

Section 26-17 lists five types of signs for which a permit fee is not required which are exceptions to the general provisions of the ordinance. Subsection 1 of section 26-17 does not require a fee for a sign on the wall of a building which announces the entity which occupies the premises. Subsection 2 does not

require a permit or a fee if the sign announces that property is for sale or for lease. Subsection 3 does not require a permit or a permit fee for a bulletin board. Subsection 4 does not require a permit or fee if a sign announces a project and names only the architect, engineer, contractor, or financial institution. Subsection 5 does not require a permit for a sign which only directs the movement of traffic on a parcel of property. These exceptions may apply to either commercial or non-commercial speech, and not only to noncommercial messages as Petitioner has incorrectly asserted.

The only regulation in this section of the ordinance is that drawings or diagrams identifying the location of the sign shall be submitted to the building official. The Eleventh Circuit was correct in holding that requiring a permit for certain signs in Douglasville is very different from an outright ban on certain signs as occurred in

Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 453 U.S. 502 (1981). Messer, at 1512, 1513. Some signs require permits and some do not, but they are not prohibited. The Petitioner did not ever challenge the permit process.

The Eleventh Circuit held that these are exemptions, not restrictions. This section of the ordinance does not add any restrictions, and it does not limit, alter, or distinguish these signs. Accordingly, the Eleventh Circuit correctly held that there was no constitutional violation.

III. SECTION 26-18 OF RESPONDENT'S ORDINANCE WHICH REQUIRES A BOND FOR CERTAIN TEMPORARY PERMITS IS A REASONABLE REGULATION AND DOES NOT VIOLATE EITHER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OR THE FIRST AMENDMENT.

Section 26-18 requires that temporary instructional signs, temporary political signs, and temporary signs which are directed towards a specific place, event, political candidate or political issue may be placed

along a street, only after the purchase of a bond in the amount of $500.00 to assure prompt removal.

Petitioner argues that this section is unconstitutional because it is allegedly a limitation on political speech, and that the ordinance is not narrowly tailored to serve a substantial government interest. The purpose of this section of the ordinance which requires the posting of a bond for temporary signs is to insure the removal of signs. Petitioner argues that the same goal could be achieved by the use of a fine after a violation, rather than the "chilling" effect of the requirement of a bond before the ordinance has been violated. Such an alternative, however, will not meet the objective of assuring the prompt removal of these signs. Moreover, Petitioner would have this Court believe that politicians are the only parties "burdened" by this measure, which is not the case.

As this section of the ordinance is directed towards candidates, issues, and events, or anything of a temporary nature, the only way to insure removal of the signs is to require a bond prior to the posting of any signs. There simply is no ability to enforce a violation after the sign is posted because when the event or issue is complete, everyone is gone. The only enforcement mechanism in these instances is requiring that a bond be posted immediately because once the organization departs or the event is over, the city would have no recourse if it were to adopt Petitioner's suggestion of trying to punish those who violate the measure after the event is over and the participants have left.

Petitioner incorrectly contends that the ordinance favors political speech over commercial messages. Section 26-18(a) pertains to signs placed along streets in which the public is directed to a specific place, event, political candidate or political

issue. While the ordinance provisions certainly include political candidates and political issues, it pertains to instances in which temporary signs relating to specific events, whether political or non-political in nature, are placed along the roadways. This ordinance is constitutional precisely because it does not favor commercial verses non-commercial or political verses non-political messages.

The cases cited by the Petitioner are inapposite to the issues in this case. For example, Petitioner identifies Verrilli v. City of Concord, 548 F. 2d 262 (9th Cir. 1977) modified on other grounds 557 F. 2d 664 (9th Cir. 1977). In that case, however, the ordinance expressly singled out only temporary political signs and candidates. Id. at 264 (fn. 1,2). The Douglasville ordinance is addressed to temporary signs. Petitioner also identifies Baldwin v. Redwood City, 540 F. 2d 1360 (9th Cir. 1976). That case set up a

cumbersome regulatory scheme which included a permit application for each sign showing detailed and irrelevant information, in addition to a permit fee of $1.00 per sign and $5.00 deposit for each sign. Id. at 1366 (fn. 14), 1371. The Douglasville ordinance requires only one bond be posted.

Finally, the Petitioner cites Police Department of City of Chicago v. Mosley, 408 U.S. 92, 92 S. Ct. 2286 (1972). In that case, a law specifically allowed picketers within a certain distance of public schools only if it involved a labor dispute. Mosley, 408 U.S. at 95, 92 S. Ct. at 2290. The law was stricken because it distinguished between the non-commercial message with no justification. Mosley, 408 U.S. at 95-102, 92 S. Ct. at 2290-2294.

Petitioner asserts that there is no evidence supporting the city's aesthetic interest in insuring the prompt removal of political (or other temporary signs).

However, such evidence is in the record as this Court only need refer to the ordinance itself which provides that aesthetics was among the goals and reasons for the adoption of the ordinance in question was as follows:

> ...to insure compatibility of signs with surrounding land uses, to enhance the business and economy of the city,...to maintain the tranquil environment of residential areas, to promote industry and commerce, to provide an aesthetically appealing environment...and to eliminate visual clutter and blight...

The Eleventh Circuit was correct in finding that no constitutional infirmity existed in this section of the ordinance. Messer, at 1513. The Petitioner's argument rests primarily upon the claim that there are other less intrusive means of assuring removal of political and special event signs after the occurrence of an event. Consistent with the law, the Court found that in the First Amendment analysis "so long as the means chosen are not substantially broader than necessary to achieve the government's

interest; however, the regulation will not be invalid simply because a Court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Ward v. Rock Against Racism, 491 U.S. 781, 800, 109 S. Ct. 2746, 2758 (1989).

In the present case, the regulation is designed to insure removal of temporary signs, and no particular message is restricted. For the reasons stated above, the regulation is narrowly drawn to achieve its goal and, accordingly, there has been no violation of the First Amendment or Equal Protection Clause.

IV. PETITIONER LACKS STANDING EXCEPT AS TO THE PROHIBITION AGAINST OFF-PREMISE SIGNS BECAUSE HE ADMITS ON THE RECORD THAT HE CARES NOTHING ABOUT OTHER SIGN ORDINANCE ISSUES.

In the lower court, Respondent asserted that Petitioner lacked standing to challenge the permit process of the ordinance, the temporary permit provisions, or the portable

display provisions of the ordinance in question. The district court stated in its Order dated June 26, 1991, that Respondent had standing to challenge these additional provisions of the Douglasville ordinance; however, the court requested that Respondent file a supplemental brief. R2-26-5. Respondent filed a supplemental brief, but the court never issued a ruling. R2-27-5.

Petitioner lacks standing because has not suffered an injury necessary in bringing a cause of action. Respondent relies in part on the case cited in the lower court's Order, Virginia v. American Booksellers Ass'n., Inc., 484 U.S. 383, 108 S. Ct. 636 (1988).

Standing requires "at an irreducible minimum an injury in fact; that is, there must be some 'threatened or actual injury resulting from the putatively illegal action...'" American Booksellers, 484 U.S. 383, ___, 108 S. Ct. 636, 642 (1988) (cit. omitted) (quoting Warth v. Seldin, 422 U.S. 490, 499, 95 S. Ct.

2197, 2205 (1975)). If an injury in fact is demonstrated, the party may generally assert only a violation of its own constitutional rights. The trial court in the present case properly noted that in the First Amendment context, an exception exists which permits a Plaintiff to raise a First Amendment constitutional challenge based on a judicial prediction or assumption that the statute may cause others to refrain from constitutionally protected speech or expression. Id. (See also Court's order, page 5). However, this does not excuse a Plaintiff from demonstrating an injury in fact which has resulted from the existence of a statute. While the Petitioner in this case may be entitled to assert the First Amendment rights of others, he has no standing because the evidence is clear that he suffered no injury in fact from the ordinance provisions which are at issue.

At issue in American Booksellers, 108 S. Ct. 636, 639, was a Virginia statute which

made it unlawful to knowingly display for commercial purposes explicit sexual material which might be seen or perused by juveniles. Plaintiffs booksellers challenged the constitutionality of the statute on First Amendment grounds even though there had not been an attempt at enforcement. American Booksellers, 108 S. Ct. 636, 642.

Although the Court in American Booksellers, 108 S. Ct. 636, 642, determined that the Plaintiffs suffered an injury in fact, it was because the statute was aimed directly at the Plaintiffs and because the Plaintiffs demonstrated that they would "have to take significant and costly compliance measures or risk criminal prosecution." Witnesses testified that Plaintiffs would have to (1) create an adults-only section of the store; (2) placed covered works behind the counter; (3) decline to carry the materials in question; or (4) bar juveniles from the store. American Booksellers, 108 S. Ct. 636, 641.

In contrast, the Petitioner in this case made no attempt whatsoever to demonstrate an injury in fact from the temporary sign permit bonding requirement or an of the exemptions to a permit. To the contrary, the Petitioner admitted that his only interest is in the billboard provisions. He has utterly no interest in temporary signs, sign exemptions, or anything other than leasing his billboard.

The Petitioner wants only to obtain enforce a lease to form Plaintiff sign companies for an off-premise sign on his property, which is located in the historic district, a lease which was not entered into until the sign companies were denied a permit for the property and was specifically for this litigation. Exhibit - Messer Deposition p. 19, 20, 32. Thereafter the lawsuit was filed.

The only recovery that the Petitioner is interested in, is the value of the lease with Adams Outdoor Advertising concerning the off-premise sign. Exhibit - Messer Deposition p.

43. Petitioner testified that he is seeking in excess of $29,000.00 which he believes is the market value of the lease with Adams. When asked if he has been damaged in any other way, his response was, "No". Exhibit - Messer Deposition p. 43.

More specific to the remaining ordinance provisions at issue, Petitioner expressly has no interest and does not care about any particular commercial or non-commercial signs. Exhibit - Messer Deposition p. 44. Petitioner has never made an application for a temporary sign or a portable sign and did not even believe that those were an issue in this case. Exhibit - Messer Deposition p. 48.

It is clear from the evidence presented that the only injury which the Petitioner can properly allege that he has suffered is based on an inability to enforce the provisions of the billboard lease against Adams. That alleged injury does not arise from Section 26-18 allowing temporary permits for

instructional and political signs, and it does not arise from Section 26-17 which allows a permit without a fee for certain types of signs.

The fact that an Petitioner may raise a First Amendment challenge based on the judicial exception referenced by the Court does not excuse him from proving an injury in fact based on the existence of the particular ordinance provision. His abstract allegations do not create the necessary injury. American Booksellers, 108 S. Ct. 636, 640 (fn. 3, referring to the rationale for the district court's dismissal of two of the Plaintiffs). See also, Int'l Caucus of Labor Committees v. Chicago, 816 F. 2d 337 (7th Cir. 1987). For these reason the Petitioner lacks standing.

CONCLUSION

Respondent City of Douglasville, Georgia respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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